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**An Empirical Study of the Purpose of the
Irish Protected Disclosures Act 2014
(Volume I)**

A thesis submitted to Middlesex University

In partial fulfilment of the requirements
for the degree of Doctor of Philosophy

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Abstract

An Empirical Study of the Purpose of the Irish Protected Disclosures Act 2014

The Protected Disclosures Act 2014 enacted on 15 July 2014, is Ireland's first pan-sectoral whistleblowing law. The purpose of the Protected Disclosures Act 2014 is described in its preamble as being 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.' The aim of this research is to determine whether the 2014 Act is fulfilling its purpose of providing protection to disclosers, as set out in its preamble. This thesis contributes to knowledge by identifying the weaknesses of the Protected Disclosures Act 2014 that are undermining its purpose and makes suggestions for reform in order to remedy these weaknesses at an early stage before the protected disclosures protection system in Ireland becomes futile.

For the purpose of this research, an assessment of the case law under the Protected Disclosures Act 2014 from 15 July 2014 to 16 July 2018 was undertaken to highlight certain patterns emerging from the use, interpretation, and application of the Protected Disclosures Act 2014. An assessment of the prescribed persons system under the Protected Disclosures Act 2014 was also undertaken in order to ascertain whether the system is functioning as intended. In addition, an analysis of prescribed persons' compliance with the governmental guidance on protected disclosures procedures was carried out. This analysis focussed on the non-statutory framework implemented by the government to complement the legislative framework. The research also included an evaluation of the difficulties faced by organisations when implementing protected disclosures procedures in relation to balancing the rights of the discloser and the rights of the alleged wrongdoer. This thesis concludes that the Protected Disclosures Act 2014 is not fulfilling its purpose and that urgent action is required to be taken, in line with the recommendations made in this thesis.

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I dedicate this thesis to all of those brave men and women who stand up for what is right. Edmund Burke said ‘The only thing necessary for the triumph of evil is for good men to do nothing’. I hope that my research will help ensure that people can raise concerns and never have to fear a negative consequence but only hope for a resolution of the wrongdoing.

Table of Contents

Abstract.....	ii
Acknowledgments.....	iii
Table of Abbreviations.....	xi
Table of Irish Words.....	xv
Table of Cases.....	xvi
Table of Legislation.....	xxiii
List of Tables.....	xxx
List of Bar Charts.....	xxxi
Chapter 1: Introduction.....	1
1.1 Research question and original contribution to knowledge.....	1
Chapter 2: The theoretical and historical context of the enactment of the Protected Disclosures Act 2014.....	6
2.1 Introduction.....	6
2.1(a) Objectives.....	6
2.1(b) Methodology.....	6
2.2 Defining ‘whistleblowing’ and ‘whistleblower’.....	7
2.3 Why is there a need for whistleblowers?.....	11
2.4 Why is there a need to protect whistleblowers?.....	14
2.5 What is ‘protection’?.....	25
2.6 History of whistleblowing in Ireland.....	29
2.7 The development of whistleblowing law in Ireland.....	34
2.7(a) The sectoral approach to whistleblowing law.....	34
2.7(b) The generic approach to whistleblowing law.....	36
2.7(c) The Protected Disclosures Act 2014.....	40
2.8 Conclusion.....	42
Chapter 3: An analysis of case law under the Protected Disclosures Act 2014.....	44
3.1 Introduction.....	44
3.1(a) Objectives.....	44

3.1(b) Methodology.....	45
3.2 Forum.....	47
3.2(a) Introduction.....	47
3.2(b) Advantages of a WRC claim.....	48
3.2(b)(i) Costs.....	48
3.2(b)(ii) Fees.....	51
3.2(b)(iii) Processing times.....	53
3.2(b)(iv) Alternative dispute resolution.....	54
3.2(b)(v) Proceedings conducted in private.....	57
3.2(c) Disadvantages of a WRC claim.....	57
3.2(c)(i) Filing times.....	57
3.2(c)(ii) Compensation.....	58
3.3 Sector.....	58
3.3(a) Introduction.....	58
3.3(b) Protected disclosures procedures.....	59
3.3(c) Training.....	61
3.4 Type of claim.....	62
3.4(a) Introduction.....	62
3.4(b) Unfair dismissal.....	63
3.4(c) Interim relief.....	66
3.4(d) Penalisation exclusive of unfair dismissal.....	69
3.5 Length of service.....	75
3.5(a) Introduction.....	75
3.5(b) Claims by workers with less than one-year's continuous service.....	78
3.6 Nature of disclosure: relevant wrongdoings.....	80
3.6(a) Introduction.....	80
3.6(b) Case law analysis.....	83

3.6(b)(i) Personal grievances.....	84
3.7 Channel of disclosure.....	87
3.7(a) Introduction.....	87
3.7(b) Case law analysis.....	88
3.7(c) Why do some workers who have made an internal disclosure, subsequently make an external one?.....	90
3.8 Reference to protected disclosures procedures.....	93
3.8(a) Introduction.....	93
3.8(b) Case law analysis.....	94
3.9 Win/lose.....	97
3.9(a) Introduction.....	97
3.9(b) Why is there a high rate of unsuccessful claims under the 2014 Act?.....	99
3.10 Remedy and quantum.....	105
3.10(a) Introduction.....	105
3.10(a)(i) Unfair dismissal.....	105
3.10(a)(ii) Interim relief.....	107
3.10(a)(iii) Penalisation exclusive of unfair dismissal.....	108
3.10(a)(iv) Tort claim under s 13 of the 2014 Act.....	109
3.10(b) Case law analysis.....	109
3.10(b)(i) Unfair dismissal case law remedies.....	110
3.10(b)(ii) Personal liability in unfair dismissal claims.....	112
3.10(b)(iii) Penalisation case law remedies.....	114
3.10(b)(iv) Motivation in successful penalisation and unfair dismissal claims.....	117
3.10(b)(v) Interim relief case law remedies.....	118
3.11 Subject to appeal.....	119
3.11(a) Introduction.....	119
3.11(b) Case law analysis.....	120

3.12 Conclusion.....	122
Chapter 4: The prescribed persons' system under the Protected Disclosures Act 2014.....	129
4.1 Introduction.....	129
4.1(a) Objectives.....	129
4.1(b) Methodology.....	130
4.2 What is the role of prescribed persons under the 2014 Act?.....	132
4.2(a) Introduction.....	132
4.2(b) Why are disclosures made to a prescribed person?.....	133
4.2(c) What are the legal requirements for making a disclosure to a prescribed person?.....	136
4.2(d) What persons are prescribed and who should be prescribed under s 7 of the 2014 Act?.....	138
4.3 Are protected disclosures being made to prescribed persons?.....	142
4.3(a) Introduction.....	142
4.3(b) Data from case law research.....	142
4.3(c) Data from annual reports.....	142
4.3(c)(i) Are prescribed persons complying with their statutory obligation to publish annual reports?.....	144
4.3(c)(ii) Are disclosures being made to prescribed persons? If so, how many have been made?.....	146
4.3(d) Data from survey responses.....	150
4.4 Do prescribed persons understand their role under the 2014 Act?.....	156
4.4(a) Introduction.....	156
4.4(b) Data from survey responses.....	156
4.5 Are prescribed persons complying with their obligations under s 21(1) to establish and maintain protected disclosures procedures and under s 21(4) to have regard to the DPER Guidance?.....	161
4.5(a) Introduction.....	161
4.5(a)(i) The impact of the existence/non-existence of Procedures in legal proceedings...	164

4.5(a)(ii) DPER Guidance	165
4.5(b) Are prescribed persons complying with their obligations under s 21(1) of the 2014 Act to establish and maintain protected disclosures procedures?.....	167
4.5(c) Analysis of whether prescribed persons are complying with their statutory obligations under s 21(4) of the 2014 Act.....	170
4.5(c)(i) Breakdown of the compliance rate of prescribed persons' Procedures with the issues in the DPER Guidance.....	173
4.5(c)(ii) Application.....	178
4.5(c)(iii) What is a protected disclosure?.....	187
4.6 Conclusion.....	193
Chapter 5: Implementing protected disclosures procedures: practical issues for recipients of disclosures in relation to the discloser and the alleged wrongdoer.....	205
5.1 Introduction.....	205
5.1(a) Objectives.....	205
5.1(b) Methodology.....	206
5.2 Confidentiality.....	206
5.2(a) Introduction.....	206
5.2(b) The 2014 Act.....	208
5.2(c) The DPER Guidance.....	210
5.2(d) WRC Code of Practice.....	213
5.2(e) Prescribed persons' Procedures analysis.....	214
5.3 Anonymous disclosures.....	217
5.3(a) Introduction.....	217
5.3(b) The DPER Guidance.....	218
5.3(c) WRC Code of Practice.....	219
5.3(d) Prescribed persons' Procedures analysis.....	219
5.3(e) The case for and against anonymous disclosures.....	221
5.4 Rights of the alleged wrongdoer.....	226
5.4(a) Introduction.....	226
5.4(b) The DPER Guidance.....	226

5.4(c) Irish Congress of Trade Unions, ‘Drafting a Whistleblowing Policy, Guidelines for Trade Union Negotiators on The Protected Disclosures Act 2014’	227
5.4(d) Prescribed persons’ Procedures analysis.....	228
5.4(e) Natural justice and fair procedures.....	229
5.4(e)(i) What are natural justice and fair procedures?.....	230
5.4(e)(ii) At what stage of the disclosures process do natural justice and fair procedures apply?.....	232
5.4(e)(iii) The balancing of rights of the discloser and the alleged wrongdoer	235
5.5 Data protection.....	241
5.5(a) Introduction.....	241
5.5(b) Protections for data subjects.....	244
5.5(c) Lawfulness of data processing.....	248
5.5(c)(i) Compliance with a legal obligation.....	249
5.5(c)(ii) Legitimate interests test.....	250
5.5(d) Information to be provided by data controller to data subject when data has not been obtained from data subject.....	252
5.5(e) Limitations on data subjects rights.....	253
5.5(f) Application of restrictions in the context of a whistleblowing scheme	254
5.5(g) Delay of notification to data subject.....	256
5.5(h) Maliciously false statements.....	257
5.6 Conclusion.....	258
5.6(a) Practical steps for organisations.....	263
5.6(b) Recommendations for statutory and non-statutory changes.....	267
Chapter 6: Conclusion.....	270
6.1 Introduction.....	270
6.2 Summary and evaluation.....	270
6.3 Limitations.....	280
6.4 Future research.....	280
6.5 Original contribution to knowledge.....	282
Bibliography.....	283

Table of Abbreviations

Abbreviation	Full title
1977 Act	Unfair Dismissals Act 1977
1996 Act	Employment Rights Act 1996
1999 Bill	Whistleblowers Protection Bill 1999
2005 Act	Safety, Health and Welfare at Work Act, 2005
2013 Bill	Protected Disclosures Bill 2013
2014 Act	Protected Disclosures Act 2014
2015 Act	Workplace Relations Act 2015
2018 Act	Data Protection Act 2018
Acas	Advisory, Conciliation and Arbitration Service
C&AG	Comptroller and Auditor General
CER	Commission for Energy Regulation
Charleton Tribunal	The Disclosure Tribunal/ Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters following Resolutions
CIÉ	Coras Iompar Éireann
CLRG	Company Law Review Group
CNIL	French data protection authority
Committee	Joint Committee on Finance, Public Expenditure and Reform
CORU	Regulating Health and Social Care Professionals
CPCC	Competition and Consumer Protection Commission
CRU	Commission for Regulation Utilities
Data Protection Working Party	Article 29 Data Protection Working Party
DPER	Department of Public Expenditure and Reform

DPER Guidance	Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (2016)
DPER Statutory Review	Statutory Review of the Protected Disclosures Act 2014
Draft EU Commission Directive on whistleblowing	Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD)
Draft Heads	Draft Heads of the Protected Disclosures in the Public Interest Bill 2012
EAT	Irish Employment Appeals Tribunal
EC	UK Early Conciliation
ECHR	European Convention on Human Rights [1950]
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
ET	UK Employment Tribunal
EU Charter	Charter of Fundamental Rights of the European Union [2016]
GDPR	Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016]
HEA	Higher Education Authority
HIA	Health Insurance Authority
HIQA	Health Information and Quality Authority
HSA	Health and Safety Authority
IAASA	Irish Auditing and Accounting Supervisory Authority

IAW	Integrity at Work
ICTU	Irish Congress of Trade Unions
ICTU Guide	Irish Congress of Trade Unions, ‘Drafting a Whistleblowing Policy, Guidelines for Trade Union Negotiators on The Protected Disclosures Act 2014’ (August 2014)
IRA	Irish Republican Army
LRC	Labour Relations Commission
Minister	Minister for Public Expenditure and Reform
MSM	Main Securities Market
MSPB	US Merit Systems Protection Board
NERA	National Employment Rights Authority
NRA	National Roads Authority
OECD	Organisation for Economic Co-operation and Development
PIDA	Public Interest Disclosure Act 1998
Procedures	Protected Disclosures Procedures
PSI	Pharmaceutical Society of Ireland
Revenue	Office of the Revenue Commissioners
RPA	Railway Procurement Agency
SEC	State Examinations Commission
SFPA	Sea Fisheries Protection Authority
SOX	US Sarbanes-Oxley Act 2002
Trade Secrets Directive	European Parliament and Council Directive 2016/943/EC of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1

TII	Transparency International Ireland
Tusla	Child and Family Agency
UKEAT	UK Employment Appeal Tribunal
WRC	Workplace Relations Commission
WWTW Guide	Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations

Table of Irish Words

Irish Word	English Translation
Bunreacht na hÉireann	Irish Constitution
An Garda Síochána/ Garda Síochána	The Police Service
Dáil/ Dáil Éireann	Lower House of the Irish legislature
Fianna Fáil	‘The Republican Party’, an Irish political party
Garda	Police (singular)
Gardaí	Police (plural)
Oireachtas	Irish legislature
Seanad/ Seanad Éireann	Upper House of the Irish legislature

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Accounts Administrator v A University ADJ-00004380

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A Commercialisation Specialist v A Government Agency ADJ-00007228

A Complainant v A Respondent ADJ-00004519

A Fire Station Officer (retired) v A Local Authority ADJ-00004684

An Employee v An Agency ADJ-00008429

An Employee v An Employer ADJ-00000258

An Employee v An Employer ADJ-00000708

An Employee v A Nursing Home ADJ-00000456

An Employee v A Public Body ADJ-00005583

An Office Administrator v A Removals and Storage Company ADJ-00008404

A Public Servant v A Government Department ADJ-00004925

A Senior Account Manager v A Print Management and Logistics Company ADJ-00005984

A Senior Official v A Local Authority ADJ-00001721

A Service Engineer v A Provider of Plant Machinery ADJ-00007236

A Worker v An Agricultural Estate ADJ-00000860

A Worker v A Communications Provider ADJ-00001380

A Worker v A Nursing Home ADJ-00000267

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Claimant v Employer ADJ-00008888
Claimant v Respondent ADJ-00002571
Employee v Employer ADJ-00003371
Mr A v A Public Body ADJ-00006360
Mr A(1) v A Government Department ADJ-00006381
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Galway CC v Connolly PDD 2/2018
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Safety, Health and Welfare at Work Act 2005

Statute of Limitations 1957

Unfair Dismissals Acts 1977-2015

Universities Act 1997

Whistleblowers Protection Bill 1999

Whistleblowers Protection Bill 2010

Whistleblowers Protection Bill 2011

Workplace Relations Act 2015

Italy

Legislative Decree 1993/285

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Kosovo

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The Netherlands

Whistleblowers Centre Act 2016

New Zealand

Protected Disclosures Act 2000

Norway

Working Environment Act 2005

Paraguay

Instructive Order 2014/7 from the Attorney General's Office

Romania

Law No 2004/571

Serbia

Law on the Protection of Whistleblowers Act, no 2014/128

Singapore

Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A)

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Council of Europe Criminal Law Convention on Corruption 27 January 1999, Eur TS No 173

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Council Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001]

Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016]

Council Regulation (EC) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012 [2012]

European Central Bank Regulation (EC) 468/2014 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014]

European Parliament and Council Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

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Commission Implementing Directive 2015/2392/EC of 17 December 2015 on Regulation (EC) 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation OJ L332/126

Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD)

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Council Directive (EC) 1995/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31

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List of Tables

3.1	Case law analysis of the length of service of complainants.....	77
4.1	Number and rate of disclosures received by prescribed persons: annual reports.....	147
4.2	Compliance rate of prescribed persons with their obligations under s 21(4) of the 2014 Act.....	171
4.3	Breakdown of the compliance rate of prescribed persons' Procedures with the issues in the DPER Guidance.....	175
6.1	Recommendations for statutory and non-statutory reform.....	274

List of Bar Charts

4.1 Rates of disclosures to prescribed persons: survey results and annual report data.....	153
4.2 Number of disclosures received by prescribed persons: survey results and annual report data.....	155
4.3 Prescribed persons' levels of understanding regarding protected disclosures Procedures, the provisions of the 2014 Act, the scope of matters in respect of which they are prescribed, and investigation procedures for protected disclosures.....	158

Chapter 1: Introduction

1.1. Research question and original contribution to knowledge

The Protected Disclosures Act 2014 ('2014 Act') came into operation in Ireland on 15 July 2014.¹ The purpose of the 2014 Act is described in its preamble as being 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.'² The central question in this thesis is whether the 2014 Act is fulfilling its purpose of providing protection to disclosers, as set out in its preamble. In order to answer this central research question, a number of ancillary questions were asked, including: (i) What can we learn about how the 2014 Act is operating from an analysis of the case law under the 2014 Act? (ii) Is the prescribed persons' system established under the 2014 Act operating effectively? (iii) How can organisations balance their obligations to respect the rights of both the discloser and the alleged wrongdoer when implementing protected disclosures procedures ('Procedures')? The period for this research is from 15 July 2014 to 16 July 2018.³

This thesis contains four substantive chapters. Chapter 2 looks at the various definitions of 'whistleblowing' and 'whistleblower' and sets out the definition of these terms that are used for the research in this thesis. This chapter also examines the vital role played by whistleblowers and the necessity to provide protection to whistleblowers, two themes that underpin the objectives of the 2014 Act. This chapter then proceeds to address the historical context of whistleblowing in Ireland and looks at how the attitude towards whistleblowers has changed through the annals. Finally, this chapter looks at the development of statutory whistleblowing law in Ireland, outlining the original approach to whistleblowing law, ie the sectoral approach, before moving onto the successive approach to whistleblowing law, ie the generic approach, which led to the enactment of the 2014 Act. The purpose of this chapter is to provide an overview of both the theoretical and historical influences on the drafting of the 2014 Act. By providing an overview of the theoretical and historical backgrounds to the drafting of the 2014 Act, this is intended to provide a foundation for the understanding of

¹ Protected Disclosures Act 2014 (Commencement) Order 2014, SI 2014/327.

² Protected Disclosures Act 2014.

³ It is acknowledged that the consequence of selecting 16 July 2018 as the cut-off point for the research herein means that developments in the UK, Ireland, and at EU level, are not included, despite their relevance. However, the research was intended to cover the four-year period after the enactment of the 2014 Act and any relevant developments outside of that timeframe will inform future research.

the assessments of the 2014 Act undertaken in the subsequent chapters in order to determine whether its purpose is being achieved.

Chapter 3 consists of an analysis of case law under the 2014 Act. In order to analyse the case law, ten issues were selected for assessment. These included the following issues: (i) Forum; (ii) Sector; (iii) Type of claim; (iv) Length of service; (v) Nature of disclosure: relevant wrongdoings; (vi) Channel of disclosure; (vii) Reference to Procedures; (viii) Win/lose; (ix) Remedy and quantum; and (x) Subject to appeal. The objective of the case law analysis was to determine how the 2014 Act is being interpreted and applied by the relevant fora since its enactment and to highlight the advantages and disadvantages for complainants and respondents in a claim under the 2014 Act. The analysis undertaken was also intended to identify patterns emanating from the use, interpretation, and application of the 2014 Act, and to identify areas requiring reform in order to ensure that the purpose of the 2014 Act is being fulfilled.

Chapter 4 assesses the prescribed persons' system under the 2014 Act in order to determine whether it is operating effectively. The research undertaken for this chapter was designed firstly to explain the role of prescribed persons under the 2014 Act. Secondly, it was designed to ascertain whether protected disclosures are being made to prescribed persons and in making that assessment, this included an investigation into whether prescribed persons are complying with their obligation under s 22 of the 2014 Act to publish annual reports on protected disclosures. Thirdly, the research conducted examined whether prescribed persons understand their role under the 2014 Act. Fourthly, the research was designed to ascertain whether prescribed persons are complying with their obligations under s 21(1) of the 2014 Act to establish and maintain Procedures and under s 21(4) of the 2014 Act to have regard to the Guidance issued by the Department of Public Expenditure and Reform for the purpose of assisting public bodies in the establishment and maintenance of their Procedures.⁴ The amalgamation of the approaches outlined was intended to highlight any weaknesses in the prescribed persons' system that undermine the purpose of the 2014 Act. By identifying these weaknesses, it was hoped that suggestions could be made to strengthen the system and ensure that it is operating effectively.

⁴ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).

Chapter 5 addresses the practical issues for recipients of disclosures in relation to the rights of the discloser and the alleged wrongdoer when implementing Procedures. In order to explore this difficulty, four key issues were addressed in this chapter. Firstly, a study was undertaken of the obligations on organisations in respect of the right of a worker to have their identity protected, subject to certain exceptions, when making a protected disclosure. This study was followed by an assessment of the rules relating to anonymous disclosures and the advantages and disadvantages of such disclosures. Both of these issues were then assessed in light of the rights of the alleged wrongdoer under natural justice and fair procedures. A final analysis was undertaken of the rights of the alleged wrongdoer under data protection rules when they are the subject of a protected disclosure. The objective of this research was to outline the scope and nature of the rights of the discloser and the alleged wrongdoer, to highlight when these rights may conflict with one another, and to provide guidance as to the best approach that an organisation can take to this conflict, in light of the purpose of the 2014 Act.

Chapter 6, the concluding chapter, summarises and evaluates the findings of the research undertaken for this thesis, explains the limitations to the research, and sets out recommendations for reform so that the purpose of the 2014 Act is achieved. It also makes suggestions for future research in this area.

This thesis contributes to knowledge in a number of ways. Firstly, the 2014 Act has been subject to limited research due to the infancy of the legislation. Since the enactment of the 2014 Act, there has been no comprehensive analysis undertaken of it. By examining the 2014 Act at this early stage valuable contributions can be made to its improvement in order to ensure that workers making a protected disclosure are afforded the most effective statutory and non-statutory protections and that their disclosures are given the best opportunity of being addressed, before problems become embedded in the legislative system and its complementary framework. Further, by assessing the 2014 Act at this stage, the research undertaken can provide a roadmap for other researchers who are researching new whistleblowing laws in their own countries.

Secondly, there has been no assessment undertaken of the entire case law under the 2014 Act in the four-year period after its enactment. The identification of erroneous decisions and the highlighting of best practice will assist decision makers under the 2014 Act in their interpretation and application of the provisions of the 2014 Act and assist lawyers in their

provision of advice and representation. In addition to highlighting strengths and weaknesses in a litigation context, the identification of patterns emerging from the case law will also assist the government in its approach to amending the legislation in order to ensure that its purpose is being attained. Further, the ten issues selected for assessment in the case law under the 2014 Act can provide a framework for researchers in other countries to evaluate the case law under their whistleblowing law regimes. This framework can also be used by researchers after the transposition of the draft EU Commission Directive on whistleblowing into national law by Member States to assess its impact from a litigation perspective across the EU.

Thirdly, the prescribed persons' system under the 2014 Act has also not been subject to a comprehensive assessment. The analysis of the websites, Procedures, and protected disclosures annual reports of prescribed persons has not been undertaken in Ireland. The research undertaken for this thesis highlights a number of key concerns that require urgent action in order to ensure that the system is operating as intended. The assessments also highlight that some of the statutory obligations imposed on public bodies are not being complied with by prescribed persons and therefore statutory amendments, as well as the introduction of non-statutory guidance, and the establishment of oversight mechanisms, are necessary in order to ensure compliance. In addition, the method of research undertaken in this thesis has developed a framework for prescribed persons' research that can be replicated by researchers in other jurisdictions. Also, when the draft EU Commission Directive on whistleblowing is transposed into national law across the EU this framework for prescribed persons' research can be applied by researchers in Member States to assess the effectiveness of the 'competent authority' system established under that Directive.

Fourthly, by addressing the practical dilemmas faced by organisations when implementing Procedures, in the context of the issues assessed, valuable guidance is provided for organisations in order to ensure that the rights of both the discloser and the alleged wrongdoer are respected and to reduce the risk of matters ending up before the courts. The identification of where conflict may arise for organisations, and the suggested solutions to this conflict, also assist the government in its development of statutory rules and non-statutory material.

This thesis concludes that the 2014 Act is not fulfilling its purpose of protecting workers who make a protected disclosure, whilst acknowledging that inevitably there will be change

to the national legislative system when the draft EU Commission Directive on whistleblowing is adopted. The case law analysis demonstrates that there is currently confusion regarding some of the provisions of the 2014 Act and that there is also an inconsistent application of the legislation. The prescribed persons' system needs a radical overhaul to ensure that workers are aware that they can make disclosures to prescribed persons and prescribed persons need to understand their obligations under the 2014 Act. Further, the lack of information, guidance, and statutory rules regarding the conflict for organisations in balancing the rights of the discloser and the alleged wrongdoer when dealing with protected disclosures means that there is a risk that the discloser's right to protection of identity, subject to certain conditions, is not being respected appropriately and is, therefore, increasing the worker's risk of penalisation/ detriment for having made a protected disclosure.

This thesis is divided into two volumes. Volume I consists of the chapters that are outlined above, whilst Volume II consists of documentation that presents the research findings referenced in Volume I in graphical form. Both volumes are intended to be read in conjunction with one another.

Chapter 2: The theoretical and historical context of the enactment of the Protected Disclosures Act 2014

2.1 Introduction

The Protected Disclosures Act 2014 ('2014 Act') was enacted on 15 July 2014. At the time of writing, the 2014 Act had reached its fourth anniversary. The drafting of the 2014 Act was influenced by both internationally developed theories relating to whistleblowing and whistleblower protection, as well as Ireland's particular historical past. As outlined in Chapter 1, the purpose of the 2014 Act is described in its preamble as being 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.'⁵ The theoretical and historical context underpinning the enactment of the 2014 Act sheds light on why this particular purpose was selected for the 2014 Act.

In order to provide an overview of the theoretical and historical context of the enactment of the 2014 Act, the following issues are addressed in this chapter:

1. Defining 'whistleblowing' and 'whistleblower'.
2. Why is there a need for whistleblowers?
3. Why is there a need to protect whistleblowers?
4. History of whistleblowing in Ireland.
5. The development of whistleblowing law in Ireland.

2.1(a) Objectives

The purpose of this chapter is to provide an overview of both the theoretical and historical influences on the drafting of the 2014 Act. Both of these influences require a detailed examination in order to provide a basis on which the assessment of the purpose of the 2014 Act can be undertaken in this thesis.

2.1(b) Methodology

The research undertaken for this chapter consisted of doctrinal research of international and national reports, articles, books, statutory rules, case law, and parliamentary debates.

⁵ Protected Disclosures Act 2014.

2.2 Defining ‘whistleblowing’ and ‘whistleblower’

The modern meaning of the term ‘whistleblowing’ was coined in 1972 by the US consumer advocate Ralph Nader, who defined it as ‘an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.’⁶ This manifestation was one of the first definitions given to the term ‘whistleblowing’. However, nearly fifty years since its modern carnation, there is notably no universally accepted definition of ‘whistleblowing’ or ‘whistleblower’. The term ‘whistleblowing’ is a general, informal term, which is interchangeable with the term ‘disclosure’.⁷

There have been many definitions of whistleblowing proposed by different interested parties, such as whistleblowing organisations, international non-governmental organisations, EU institutions, and academics alike. For example, Near and Miceli define ‘whistleblowing’ as ‘the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.’⁸ This definition has been described as covering any form of organisational wrongdoing, including wrongdoing that harms not only the organisation but also individuals in the organisation, and society generally.⁹ This definition of whistleblowing is considered to be the most widely used definition in whistleblowing research.¹⁰ It has been recognised that using a standard definition by most researchers has facilitated empirical investigation of the differences between whistleblowers and others reporting wrongdoing and of different types of whistleblowers.¹¹

The International Labour Organization defines ‘whistleblowing’ as the ‘reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by

⁶ Ralph Nader, Peter J Petkas, and Kate Blackwell, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman 1972) vii.

⁷ Oireachtas Library and Research Service, ‘Spotlight: Disclosure of information: duty to inform and whistleblowing’ (L&RS 16 December 2011) 2.

⁸ Janet P Near and Marcia P Miceli, ‘Organizational Dissidence: The Case of Whistle-blowing’ (1985) 4(1) *Journal of Business Ethics* 1, 4.

⁹ Michael T Rehg and others, ‘Antecedents and Outcomes of Retaliation against Whistleblowers: Gender Differences and Power Relationships Organization Science’ (2008) 19(2) *Organization Science* 221, 222.

¹⁰ David Lewis, AJ Brown and Richard Moberly, ‘Whistleblowing, its importance and the state of research’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 4.

¹¹ Marcia P Miceli, Suelette Dreyfus and Janet P Near, ‘Outsider ‘whistleblowers’: Conceptualizing and distinguishing ‘bell-ringing’ behaviour’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 71.

employers.’¹² This definition is a narrow one as it refers to reporting by ‘employees’ and ‘former employees’ only, as opposed to a wide range of workers and it does not refer to whom the report should be made. It also limits the wrongdoing to actions by the employer specifically.

The Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs and Human Rights defines ‘whistleblowers’ as ‘concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk’.¹³ This definition underscores the position adopted either explicitly or implicitly in numerous whistleblowing statutes that protection should not extend to persons who make disclosures of a personal grievance only.¹⁴

Transparency International¹⁵ has developed a guiding definition of ‘whistleblowing’ in their ‘International Principles for Whistleblower Legislation’ and states that it is ‘the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations¹⁶ – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.’¹⁷ This definition is considered to be a middle of the road definition of the slightly broader basic definition of that developed by Near and Miceli.¹⁸

The draft EU Commission Directive on whistleblowing refers to ‘whistleblowers’ in its explanatory memorandum as being ‘persons who report (within the organisation concerned or to an outside authority) or disclose (to the public) information on a wrongdoing obtained in a work-related context’.¹⁹ This definition emphasises the workplace context of

¹² International Labour Organization, ‘ILO Thesaurus’ (*ILO*) <<http://ilo.multitools.net/default.asp>> accessed 19 February 2019.

¹³ Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of “whistle-blowers”, para 1.

¹⁴ The issue of personal grievances in the context of protected disclosures are addressed in Chapter 3.

¹⁵ Transparency International is a politically non-partisan anti-corruption organisation with more than 100 chapters across the world. Its mission is to stop corruption and promote transparency, accountability, and integrity at all levels and across all sectors of society. For more information, see: <www.transparency.org> accessed 17 February 2019.

¹⁶ This includes perceived or potential wrongdoing.

¹⁷ Transparency International, ‘International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest’ (TI 2013) 4.

¹⁸ David Lewis, AJ Brown and Richard Moberly, ‘Whistleblowing, its importance and the state of research’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 4.

¹⁹ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 1.

whistleblowing but unlike some other definitions, acknowledges that disclosures made in the wider public domain can also constitute whistleblowing.

In the Irish context, the Oireachtas Library and Research Service, which carried out an examination in 2011 into disclosures of information, defines ‘whistleblowing’ as ‘a process whereby a person perceives an activity to be illegal, unethical or immoral and discloses this activity.’²⁰ Whilst the Company Law Review Group (‘CLRG’)²¹ stated in its 2007 annual report that ‘whistleblowing’ is usually interpreted to mean ‘the reporting, in good faith, of a breach or potential breach of the law, and the according of a measure of protection to the person reporting, against penalisation by the entity about whom the report has been made.’²² Both of these definitions pre-date the 2014 Act and therefore conflict somewhat with the 2014 Act, but as highlighted in the CLRG definition and reflected in the provisions of the 2014 Act, whistleblowing concerns both a disclosure and the affording of protection to disclosers.

Lewis et al recognise that the variations in the definition of ‘whistleblowing’ and ‘whistleblower’ highlight that the ‘debate is alive and well regarding the reasons for, and nature of, the recognition that societies are giving to the role of individual citizens in reporting wrongdoing by or within their organizations and institutions.’²³ They emphasise that there are two issues underpinning these debates. First, there is a growing recognition that individuals who make disclosures need support and protection, and second, there is a particular value to the information disclosed by such persons as being the ‘trigger for institutional, regulatory and societal responses to deal with wrongdoing.’²⁴

There may not be a universally accepted legal definition of ‘whistleblowing’, but it is recognised that the concept of ‘whistleblowing’ must be presented in a clear and comprehensive manner in whistleblowing legislation.²⁵ The Australian Senate Select

²⁰ Oireachtas Library and Research Service, ‘Spotlight: Disclosure of information: duty to inform and whistleblowing’ (L&RS 16 December 2011) 2.

²¹ The Company Law Review Group is a statutory advisory expert body that advises the Minister for Business, Enterprise & Innovation on the review and development of company law in Ireland. For more information, see: <www.clrg.org> accessed 30 January 2019.

²² Company Law Review Group, ‘Report of the Company Law Review Group 2007’ (CLRG 2007) para 6.4.1.

²³ David Lewis, AJ Brown and Richard Moberly, ‘Whistleblowing, its importance and the state of research’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 5.

²⁴ *ibid.*

²⁵ The Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs and Human Rights in its Resolution on the protection of whistleblowers invited all Member States to review their whistleblower protection and in doing so keeping in mind the principle that ‘Whistle-blowing legislation should be

Committee on Public Interest Whistleblowing emphasised that ‘what is important is not the definition of the term, but the definition of the circumstances and conditions under which employees who disclose wrongdoing should be entitled to protection from retaliation.’²⁶

A 2011 study prepared by the Organisation for Economic Co-operation and Development (‘OECD’),²⁷ which examined a number of legal definitions of ‘whistleblowing’, concluded that key characteristics common to a legal definition of ‘whistleblowing’ could include: (i) the disclosure of wrongdoings connected to the workplace; (ii) a public interest dimension, eg the reporting of criminal offences, unethical practices, etc, rather than a personal grievance; and (iii) the reporting of wrongdoings through designated channels and/or to designated persons.²⁸

These key characteristics, as identified by the OECD, are reflected in the provisions of the 2014 Act. In order for a disclosure to fall within the scope of the 2014 Act, a worker must make a disclosure of ‘relevant information’ through one or more specific disclosure channels.²⁹ Information will be considered ‘relevant information’ if (i) in the reasonable belief of the worker, the information tends to show one or more relevant wrongdoings, and (ii) the information came to the attention of the worker in connection with their employment.³⁰

As the aim of this research is to determine whether the 2014 Act is fulfilling its purpose of providing protection to disclosers, as set out in its preamble, the statutory definition of a protected disclosure (ie whistleblowing) under the 2014 Act is used throughout the thesis for the purpose of the research. This definition will also serve as the basis for any future research of the 2014 Act undertaken by the researcher. This approach will ensure consistency and

comprehensive’. Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of “whistle-blowers”, para 6.1.

²⁶ The Parliament of the Commonwealth of Australia, ‘In the Public Interest, Report of the Senate Select Committee on Public Interest Whistleblowing’ (Commonwealth of Australia August 1994) para 2.12.

²⁷ The mission of the Organisation for Economic Co-operation and Development is to promote policies that will improve the economic and social well-being of people around the world. It provides a forum in which governments can work together to share experiences and seek solutions to common problems. For more information, see: <www.oecd.org> accessed 17 February 2019.

²⁸ Organisation for Economic Co-operation and Development, ‘G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, Compendium of Best Practices and Guiding Principles for Legislation’ (OECD 2011) 8.

²⁹ Protected Disclosures Act 2014, s 5(1).

³⁰ *ibid* s 5(2).

will allow appropriate comparisons to be made between the research undertaken in this thesis and in future research undertaken by the researcher.

2.3 Why is there a need for whistleblowers?

Transparency International has recognised that early disclosure of wrongdoing or the risk of wrongdoing can protect human rights, help to save lives, and safeguard the rule of law.³¹ Public, private, and non-profit sector workers have access to up-to-date information concerning their workplaces' practices and are usually the first to recognise ethical or legal violations. Therefore, the role that a whistleblower plays is indispensable in uncovering those wrongdoings.

The Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights recognised the important role played by whistleblowers in Resolution 1729(2010) on the basis that 'their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors.'³²

Further, in 2014, the Committee of Ministers of the Council of Europe adopted Recommendation (2014)7 on the Protection of Whistleblowers.³³ This Recommendation again emphasised the essential role played by whistleblowers and provides that the Committee of Ministers recognise that 'individuals who report or disclose information on threats or harm to the public interest ("whistleblowers") can contribute to strengthening transparency and democratic accountability.'³⁴

Disclosing wrongdoing in public and private sectors has become an evolving interest in the governments of OECD countries. The OECD has emphasised that by putting facilities in place that encourage the reporting of misconduct by employees substantially helps organisations to both detect and respond swiftly to wrongdoings such as fraud and corruption in the private sector and mismanagement and misuse of public funds in the public sector.³⁵

³¹Transparency International, 'Whistleblowing, Solution' (TI) <www.transparency.org/topic/detail/whistleblowing> accessed 20 February 2019.

³² Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", para 1.

³³ Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers' Deputies (SPDP Council of Europe 2014).

³⁴ *ibid.*

³⁵ Organisation for Economic Co-operation and Development, 'G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers' (OECD 2011) 4.

The OECD has also highlighted that encouraging and facilitating whistleblowing helps authorities monitor compliance and detect violations of anti-corruption laws.³⁶ Further, the OECD has stressed that protecting whistleblowers from retaliation is integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.³⁷

Whistleblowing is considered to be among the most effective, if not the most effective means to expose and remedy corruption, fraud, and other types of wrongdoing in the public and private sectors.³⁸ In Ireland, the Mahon Tribunal in its Final Report expressed the view that whistleblower protection plays an important role in the detection of corruption offences.³⁹ This view is reflected in a number of different studies. For example, a worldwide survey of KPMG professionals who investigated 750 fraudsters between March 2013 and August 2015, uncovered that 44% of fraudsters were detected as a result of a tip, complaint, or a formal whistleblowing hotline.⁴⁰ Further, the Association of Certified Fraud Examiners identified that in 2,690 cases of real occupational fraud, from 125 countries, and in twenty-three industry categories, tips were by far the most common initial detection method, with 40% of occupational fraud being detected as a result of a tip.⁴¹ Of those tips, 53% came from employees, whilst 14% were anonymous.⁴² The report also identified that 50% of corruption came to light because of tips.⁴³

The important role played by whistleblowers generally has been highlighted in a comprehensive research project carried out by the University of Greenwich and Protect.⁴⁴

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Blueprint for Free Speech, 'Whistleblower Protection Rules in G20 Countries: The Next Action Plan' (Blueprint for Free Speech 2014) 11. Blueprint for Free Speech is an Australian based, internationally focused, not-for-profit organisation, concentrating on research into 'freedoms' law. Its areas of research include public interest disclosures, defamation, censorship, right to publish, shield laws, media law, internet freedom, intellectual property, and freedom of information. The organisation has expertise in whistleblowing legislation around the world, with a database of analyses of more than twenty countries' whistleblowing laws, protections, and gaps. For more information, see: <www.blueprintforfreespeech.net> accessed 17 February 2019.

³⁹ Tribunal of Inquiry into Certain Planning Matters and Payments, *Final Report* (2012) 2531. Frank Dunlop and James Gogarty blew the whistle on corruption in the planning process in Ireland from the late 1980s to the late 1990s, which resulted in the establishment of the Flood/Mahon Tribunal. Full report is available at: <<https://planningtribunal.ie/reports/>> accessed 17 February 2019.

⁴⁰ KPMG International, 'Global profiles of the fraudster: Technology enables and weak controls fuel the fraud' (KPMG May 2016) 9.

⁴¹ Association of Certified Fraud Examiners, 'Report to the Nations 2018, Global Study on Occupational Fraud and Abuse' (ACFE 2018) 17.

⁴² *ibid* 4.

⁴³ *ibid* 13.

⁴⁴ University of Greenwich and Protect, 'Whistleblowing: The Inside Story A study of the experiences of 1,000 whistleblowers' (Protect May 2013). This project looked at the experiences of 1,000 whistleblowers in the United Kingdom. The experiences of whistleblowers were coded at the point of contact when the whistleblower

The research project found that the outcome in 54% of cases was that the wrongdoing disclosed by the whistleblower ceased to occur.⁴⁵ In 74% of the cases, the wrongdoing disclosed was causing harm to not only the organisation involved but also to the wider public.⁴⁶ According to the findings of this project, prior to the whistleblower contacting Protect, in 33% of the cases, the wrongdoing had been ongoing for between six to twenty-four months; in 10% of the cases the wrongdoing had been ongoing for between two to five years; and in 4% of the cases the wrongdoing had been ongoing for more than five years.⁴⁷ Further, the incidence of recurring wrongdoings was a staggering 86% as opposed to a one-off occurrence that amounted to 14% of the cases.⁴⁸ These figures indicate that without the whistleblower coming forward, there was a significant risk that the wrongdoing would recur over a notable period. Nonetheless, it must be remarked that in 43% of the cases, the wrongdoing had been taking place for less than six months, and in 10% of the cases, the wrongdoing was anticipated but had not occurred. This finding indicates that whistleblowers are motivated to speak up at an early stage if they witness wrongdoing and can act as an early warning system for an organisation.⁴⁹

In Ireland, the important role played by whistleblowers has been highlighted by the European Commission, which estimated that comprehensive and well-implemented whistleblower protection in Ireland would potentially allow for the identification of corrupted funds in public procurement in the range of €57.4 million to €95.6 million annually.⁵⁰ In the 2016

sought advice from Protect through their advice line between 20 August 2009 and 30 September 2010. Protect is an independent authority in the UK which seeks to ensure that concerns about malpractice are properly raised and addressed in the workplace. It was established in 2003. It pursues its aim by providing a free confidential advice line, support, and services to organisations, policy work, and public education activities. It was also involved in settling the scope and detail of the Public Interest Disclosure Act 1998. For more information, see: <www.pcaw.org.uk/> accessed 17 February 2019.

⁴⁵ *ibid* 32. The results for the final outcomes for the wrongdoing in this research project were based on thirty-nine cases. The data were based on small numbers due to the way that Protect take information from callers. Protect offer advice and support to whistleblowers during their whistleblowing journey but rarely receive feedback from the whistleblower at the end of the process. Thus, Protect has a lot of information about the circumstances that cause the whistleblower to raise their concern and what affect this has on them and their working lives but it has relatively little information in relation to the final outcomes. Protect are unable to follow up in many cases due to the high volume of cases received by them and due to the limitations of their resources.

⁴⁶ *ibid* 10. This figure is based on information for 994 of the cases in the sample. The result of 74% is made up as follows: in 57% of the cases there was only outsider harm, whilst in 17% of the cases there was both outsider and insider harm.

⁴⁷ *ibid* 11. These figures are based on information for 530 of the cases in the sample.

⁴⁸ *ibid*. These figures are based on information for 998 of the cases in the sample.

⁴⁹ *ibid*.

⁵⁰ Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission), *Estimating the Economic Benefits of Whistleblower Protection in Public Procurement Final Report* (European Commission July 2017) 68. The report states further that ‘As not all corruption and unlawful actions result in

Transparency International Ireland ('TII')⁵¹ Integrity at Work ('IAW') survey,⁵² it found that more than one in ten employees have reported wrongdoing at work.⁵³ It was suggested that this equated to some 160,000 Irish workers having blown the whistle at work at some point during their career.⁵⁴ This finding highlights the prevalence of wrongdoing being identified and disclosed by workers in Ireland.

2.4 Why is there a need to protect whistleblowers?

Legal, organisational, and national cultural contexts often discourage employees from making disclosures about alleged wrongdoings that are causing them concern. Whistleblowers may face severe personal and professional retaliation for making a disclosure, including dismissal, psychological damage, threats, or even physical harm. 'Retaliation' may be defined as 'undesirable action taken against a whistleblower-in direct response to the whistle blowing-who reported wrongdoing internally or externally, outside the organization'.⁵⁵

The Mahon Tribunal in Ireland, in its Final Report, noted in respect of whistleblowers that 'Corruption is frequently an offence committed by wealthy and/or powerful members of the Community and those reporting it may well fear the consequences of doing so for their own careers and employment prospects. Whistleblower protection may help alleviate those fears, thus facilitating the reporting of corruption offences.'⁵⁶

a loss of public funds, we estimated that the amount of public funds that could be potentially recovered in the area of public procurement amount to €10.3 million to €17.2 million annually.'⁵⁰ *ibid.*

⁵¹ Transparency International Ireland, founded in 2004, is a chapter of the politically non-partisan anti-corruption organisation, Transparency International. Its vision for Ireland is described as being 'an Ireland that is open and fair – and where entrusted power is used in the interest of everyone. TI Ireland's mission is to empower people with the support they need to promote integrity and stop corruption in all its forms.' For more information, see: <www.transparency.ie> accessed 17 February 2019.

⁵² In 2016, Transparency International Ireland carried out their Integrity at Work survey, which was conducted on its behalf by Behaviour & Attitudes (Behaviour & Attitudes is Ireland's leading independent market research agency. For more information, see: <<https://banda.ie/>> accessed 4 October 2018). The purpose of the survey was to gauge Irish employers and employees attitudes towards and awareness of whistleblowing, and of the 2014 Act. This was the first survey of its kind conducted at national level and included 878 employees and 350 employers from the private and not-for-profit sectors. Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 36.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Michael T Rehg and others, 'Antecedents and Outcomes of Retaliation against Whistleblowers: Gender Differences and Power Relationships Organization Science' (2008) 19(2) Organization Science 221, 222.

⁵⁶ Tribunal of Inquiry into Certain Planning Matters and Payments, *Final Report* (2012) 2659.

Further, the Nyberg Report into Ireland's banking crisis found that a contributor to the crisis was that those expressing contrarian views often risked sanctions and loss of employment. It stated that:

The very limited number of warning voices was largely ignored ... It also appears that some stayed silent in part to avoid possible sanctions. The Commission suspects, on the basis of discussions held with a wide number of people, that there may have been a strong belief in Ireland that contrarians, non-team players, fractious observers and whistleblowers would be informally (though sometimes even publicly) sanctioned or ignored, regardless of the quality of their analysis or their place in organisations.⁵⁷

Transparency International also identified this finding in its assessment of the National Integrity System in Ireland, where it stated:

In the context of Ireland's banking crisis, it is notable that only a small number of individuals with knowledge of serious malpractice and corporate governance failures came forward with information. Although cultural factors may have contributed to this silence, there is also substantial evidence to suggest that fear of retaliation is a significant factor inhibiting people from speaking out in the public interest.⁵⁸

Comprehensive protection, including both the legal safeguard and the supporting institutional assistance for whistleblowers, has become an increased concern of OECD countries. At the Seoul Summit in November 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anti-corruption agenda.⁵⁹ Further, the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights, in recognising that potential whistleblowers are often discouraged by a fear of reprisal or the lack of follow-up given to their warnings, unanimously adopted a resolution on whistleblowing calling on all Member States to introduce comprehensive laws to protect whistleblowers.⁶⁰ Also, International Conventions, such as the UN Convention against Corruption,⁶¹ the Council of Europe Civil Law Convention on Corruption,⁶² the

⁵⁷ Commission of Investigation into the Banking Sector in Ireland, 'Misjudging Risk: Causes of the Systematic Banking Crisis in Ireland, Report of the Commission of Investigation into the Banking Sector in Ireland' (March 2011) 97.

⁵⁸ Transparency International, 'National Integrity Systems, Country Addendum, Ireland' (TI 2012) 15.

⁵⁹ Organisation for Economic Co-operation and Development, 'G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers' (OECD 2011) 2.

⁶⁰ Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers".

⁶¹ UN General Assembly, Convention against Corruption, 21 Nov 2003, A/RES/58/4, art 33.

⁶² Council of Europe Civil Law Convention on Corruption 4 November 1999, Eur TS No 174, art 9.

Inter-American Convention against Corruption,⁶³ and others,⁶⁴ have recognised the fundamental importance in protecting whistleblowers and commit the signatories to implement appropriate whistleblower protection legislation. Most recently, the draft EU Commission Directive on whistleblowing has set down minimum standards of harmonisation on whistleblower protection across Member States and will require all Member States to comply with these minimum standards, with the possibility to introduce or retain more favourable provisions regarding the rights of whistleblowers.⁶⁵

It has been recognised, however, that the rate of whistleblower suffering varies dramatically.⁶⁶ There have been a number of studies conducted across different national contexts, sectors, organisation cultures, and so forth, which looked at the rates of suffering by whistleblowers.

What has been identified in respect of the different studies is that when a study consists of a small and unrepresentative sample of respondents, there is a high rate of suffering identified, especially if the sample is explicitly chosen from contexts where it is known that the whistleblowing event has gone wrong.⁶⁷ For example, in a South African study, all eighteen whistleblowers had suffered.⁶⁸ Further, in an Australian study, thirty-four of thirty-five whistleblowers had suffered,⁶⁹ whilst in a Swedish study of twenty-eight public sector whistleblowers, twenty-four had suffered.⁷⁰ In the study carried out by the University of Greenwich and Protect of the experiences of one thousand whistleblowers in the UK, it was found that in 327 cases, 69% of whistleblowers directly indicated that their personal position changed for the worse after their first attempt to raise a concern.⁷¹ Although this study

⁶³ Inter-American Convention against Corruption, 29 Mar 1996, 35 ILM 724, art 3.

⁶⁴ African Union Convention on Preventing and Combating Corruption, 11 July 2003, 43 ILM 1, art 5; Organisation for Economic Co-operation and Development, 'Anti-Corruption Action Plan for Asia and the Pacific' (OECD 30 November 2001) pillar 3; Council of Europe Criminal Law Convention on Corruption 27 January 1999, Eur TS No 173, art 22; OECD, Convention on Bribery of Foreign Official in International Business Transactions, 17 Dec 1997, 37 ILM 1, annex 6; Southern African Development Community, Protocol against Corruption, 14 August 2001, art 4.

⁶⁵ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 6.

⁶⁶ Marcia P Miceli, Janet P Near and Terry Morehead Dworkin, *Whistle-blowing in Organizations* (Routledge 2008) 23.

⁶⁷ Rodney Smith, 'Whistleblowers and suffering' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 233.

⁶⁸ Tina Uys, 'Rational Loyalty and Whistleblowing: the South African Context' (2008) 56(6) *Current Sociology* 904, 909.

⁶⁹ K Jean Lennane, 'Whistleblowing: A Health Issue' (1993) 307(6905) *British Medical Journal* 667, 668.

⁷⁰ Ulla-Carin Hedin and Sven-Axel Månsson, 'Whistleblowing Processes in Swedish Public Organisations: Complaints and Consequences' 15(2) *European Journal of Social Work* 151, 160.

⁷¹ University of Greenwich and Protect, 'Whistleblowing: The Inside Story A study of the experiences of 1,000 whistleblowers' (Protect May 2013) 27.

concerned a greater number of respondents than in the aforementioned studies, the sample consisted of whistleblowers who were seeking advice from Protect, and therefore, are more likely to be in a position where the whistleblowing event had gone wrong.

Studies that consist of a larger, systematic, sampling of workforce also have limitations as to their value regarding the rates of suffering experienced by whistleblowers, as not all of the workforce sampled will have observed wrongdoing and of those who have, a smaller subsample will have reported the alleged wrongdoing and furthermore, a smaller subsample again will have suffered.⁷² For example, from the analysis of data collected from questionnaires completed by a stratified random sample of federal employees in 1980, 1983, and 1992, reprisal was reported by 17% to 38% of identified whistleblowers.⁷³ In another US study in 2013, which surveyed 6,420 employees in the for-profit sector, 21% of those who reported misconduct that they observed in the workplace indicated that they faced some form of retribution as a result.⁷⁴ Similarly, an Australian study of whistleblowers in the public sector in 2006 found that of 877 employees, 22% were treated badly by co-workers, managers, or both.⁷⁵ Further, the Freedom to Speak Up review of whistleblowing in the NHS, which received 19,764 responses to its survey,⁷⁶ found that of 4,292 staff in NHS trusts who had raised concerns, 19.7% reported being ignored by management, 9.1% reported being ignored by co-workers, 17.3% reported being victimised by management, and 8.2% reported being victimised by co-workers.⁷⁷ With regard to primary care staff, the review found that of 973 staff in GP practices and community pharmacies who had raised concerns, 18.8% reported being ignored by management, 7% reported being ignored by co-workers, 16.2% reported being victimised by management, and 6% reported being victimised by co-workers.⁷⁸ Remarkably, in a study of whistleblowing in Norway, which consisted of sending

⁷² Rodney Smith, 'Whistleblowers and suffering' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 233.

⁷³ Marcia P Miceli and others, 'Can Laws Protect Whistle-Blowers? Results of a Naturally Occurring Field Experiment' (1999) 26(1) *Work Occupations* 129, 142.

⁷⁴ Ethics Resource Center, *National Business Ethics Survey of the US Workplace* (Ethics Resource Center 2014) 13.

⁷⁵ Rodney Smith and AJ Brown, 'The good, the bad and the ugly: whistleblowing outcomes' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector Enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press 2008) 123.

⁷⁶ This figure of 19,764 responses consisted of 15,120 staff in NHS trusts and 4,644 staff working in primary care, ie GP practices and community pharmacies. David Lewis, Alessio D'Angelo and Lisa Clarke, 'The independent review into creating an open and honest reporting culture in the NHS, Quantitative Research Report, Surveys of NHS staff, trusts and stakeholders' (January 2015) 7. This report is available at: <<http://freedomtospeakup.org.uk/our-research/>> accessed 28 March 2019.

⁷⁷ *ibid* 33.

⁷⁸ *ibid* 59.

a questionnaire to a representative sample of the Norwegian workforce in 2005, found that of 252 whistleblowers, only 3.2% indicated that they suffered retaliation from leaders or board.⁷⁹

The first national survey conducted in Ireland on the topic of whistleblowing in the private and non-profit sectors, asked the question ‘Did sharing your concern have an impact on how you were treated?’⁸⁰ Of the 101 respondents to this question, 50% responded that it had no impact on them, 28% said that it had a positive impact on them, whilst 21% said it had a negative impact on them.⁸¹ These findings again undermine the perception that whistleblowers suffer and give weight to the statement made by De Maria that ‘The non-suffering whistleblower is a contradiction in terms’.⁸²

However, an important factor that impinges on the assessment of rates of suffering and retaliation in the studies outlined is that ‘Researchers have not developed a consensual approach to categorizing and measuring specific types of whistleblower suffering’.⁸³ This omission, coupled with the different contexts of the various surveys of whistleblowers experiences, means that the rates of retaliation cannot be explicitly established with regards to all whistleblowers.

Even if, as Smith argues, that ‘Contrary to the popular wisdom, most whistleblowers do not suffer’,⁸⁴ there is still a necessity to ensure the protection of those whistleblowers who may suffer. As Miceli and Near emphasise, the suggestion that most whistleblowers do not suffer ‘is not to deny that retaliation occurs or to minimize its devastating impact where it does occur ... any retaliation against a whistleblower who is acting in good faith is too much retaliation.’⁸⁵ It has been identified that the risk of retaliation may be based on different

⁷⁹ Bjørkelo and others, ‘Silence is golden? Characteristics and experiences of self-reported whistleblowers’ (2011) 20(2) *European Journal of Work and Organizational* 206, 219.

⁸⁰ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 36.

⁸¹ *ibid.*

⁸² William De Maria, *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Wakefield Press 1999) 25.

⁸³ Rodney Smith, ‘Whistleblowers and suffering’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 234. Smith suggests that ‘The development of standard questionnaire items on suffering, whistleblower characteristics, organizational characteristics, reporting paths, and the like is essential if we want to know whether, for example, national cultures really do affect the rates, types and causes of whistleblower suffering. The same point holds true if we are to make comparisons of whistleblower suffering across the public, private and not-for-profit community sectors, or within different organizational cultures (police versus civilian, for example,) or in the same sorts of organizations over time (the Ethics Resource Center surveys of US companies are a start in this last area)’. *ibid* 248.

⁸⁴ *ibid* 234.

⁸⁵ Marcia P Miceli and Janet P Near, *Blowing the whistle: the organizational and legal implications for companies and their employees* (Lexington Books 1992) 81.

factors, as Near and Miceli explain ‘the power of the whistle-blower influences the level of retaliation suffered in some situations, as do characteristics of the wrongdoing itself and characteristics of the whistle-blowing process.’⁸⁶

The issue of protection for whistleblowers is not only important with regards to ensuring that individuals do not suffer retribution for their actions but also to minimise the risk of deterrence to others from coming forward when they observe wrongdoing in the workplace. There are mixed findings as to the deterrent effect of retaliation on whistleblowing. For example, in a study of twenty-one articles examining whistleblowing and retaliation against whistleblowers,⁸⁷ it found that the threat of retaliation is negatively related to the intent to blow the whistle, whilst appearing to be unrelated to actual whistleblowing behaviours.⁸⁸ The researchers noted that the ‘threat or fear of retaliation appears to greatly reduce the likelihood that an observer of wrongdoing will intend to blow the whistle, but does not impact actual whistleblowing. Therefore, it appears that once the intention to whistle-blow is formed, fear of retaliation for whistleblowing does not serve to de-motivate action.’⁸⁹ Further, in a study of 725 executives and managers in the US, which examined a variety of individual, organisational, and moral perception variables concerning the likelihood of their blowing the whistle on less serious fraud, found that:

The present study also concludes that, of all the variables examined, being an upperlevel or middle-level manager were the other two variables that have the most powerful influence on the likelihood of blowing the whistle on less serious fraud. This is consistent with prior research in this area, which concluded that interlevel differences exist between upper-level, middle-level, and first-level managers on whistleblowing with upper-level managers generally less threatened by fear of retaliation and more willing to blow the whistle.⁹⁰

Data from three surveys of federal employees conducted since 1980 by the US Merit Systems Protection Board (‘MSPB’) that were analysed by Near and Miceli found that

⁸⁶ Marcia P Miceli and Janet P Near ‘An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US’ (2013) 72(4) Australian Journal of Public Administration 433, 442.

⁸⁷ Jessica R Mesmer-Magnus and Chockalingam Viswesvaran, ‘Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation’ (2005) 62(3) Journal of Business Ethics 277, 283. One hundred and ninety-three correlations from twenty-six samples reported in twenty-one articles (total N = 18,781) examining whistleblowing (including intent to blow the whistle, likelihood of blowing the whistle, and actual whistleblowing, both via internal and external channels) and retaliation against whistleblowers were included in this meta-analysis.

⁸⁸ *ibid.*

⁸⁹ *ibid* 290-291.

⁹⁰ John P Keenan, ‘Blowing the Whistle on Less Serious Forms of Fraud: A study of Executives and Managers’ (2000) 12(4) Employee Responsibilities and Rights Journal 210, 211, and 213.

retaliation is used by managers to discourage potential future whistleblowers.⁹¹ They also noted, however, that when comparing the differences in z-scores between 1980 (the baseline data collected as the Civil Service Reform Act 1978 was implemented) and 1992, the rate of whistleblowing increased from 26% to 48%; anonymous versus identified whistleblowing increased from 26% to 45%; and retaliation increased from 17% to 38%.⁹² These findings highlight that although the rates of retaliation were increasing, so were the rates of whistleblowing, thus indicating that retaliation is not always a deterrent to blowing the whistle. Nonetheless, this has to be read in conjunction with the findings that the rate of anonymous versus identified whistleblowing also increased, indicating that whistleblowing may increase if anonymous whistleblowing is facilitated, thus reducing the risk of retaliation. In the IAW study conducted in Ireland, it identified that 33% of employees surveyed said that a key influencing factor for reporting wrongdoing in the workplace is if they could report anonymously. However, 28% of the employees surveyed said that a key influencing factor was if they were guaranteed confidentiality, whilst only 6% said that a key influencing factor was if they knew they would be compensated for any harm they might suffer as a result of making their report.⁹³

Liyanarachchi and Newdick explain that ‘Despite the mixed nature of empirical results, the general pattern is that the harsher the retaliation, the less likely an individual is to blow the whistle. Accordingly, the strength of potential retaliation is likely to influence an individual’s decision to blow the whistle.’⁹⁴ This position is substantiated by the findings of a study conducted by Liyanarachchi and Newdick on the impact of moral reasoning and retaliation on whistleblowing.⁹⁵ The findings indicated that the mean propensity to blow the whistle increases as the threat of retaliation becomes weak⁹⁶ and led the researchers to conclude that

⁹¹ Janet P Near and Marcia P Miceli, ‘Wrongdoing, Whistle-Blowing, and Retaliation in the U.S. Government What Have Researchers Learned From the Merit Systems Protection Board (MSPB) Survey Results?’ (2008) 28(3) *Review of Public Personnel Administration* 263, 287.

⁹² *ibid* 271.

⁹³ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 39.

⁹⁴ Gregory Liyanarachchi and Chris Newdick, ‘The Impact of Moral Reasoning and Retaliation on Whistle-Blowing: New Zealand Evidence’ (2009) 89(1) *Journal of Business Ethics* 37, 42.

⁹⁵ *ibid* 44. A survey was administered to accounting students in an auditing course that is offered at the final stage of the undergraduate program in a large New Zealand university. Liyanarachchi and Newdick explain that ‘This particular course was selected for several reasons. Firstly, it allowed us to examine accounting students who were about to enter the accounting profession, so the results would be a reasonable approximation to those employees who are at the lower level of accounting firms and who may encounter ethical dilemmas. Secondly, students enrolled in the course had achieved a good understanding of accounting and auditing issues due to their previous learning experiences at university.’ The survey was administered to 138 students. There were fifty-four responses but only fifty-one were fully completed, this gave a response rate of 37%.

⁹⁶ *ibid*.

the strength of retaliation has a significant impact on participants' propensity to blow the whistle.⁹⁷

In 2017, the European Commission conducted a public consultation in advance of the drafting of its draft Directive on whistleblowing. Of the 5,707 respondents, 99.4% agreed that whistleblowers should be protected.⁹⁸ This finding indicates that although not all whistleblowers suffer as a result of making their disclosure, there is still a strong belief that protection is necessary and warranted.

In addition to protection from retaliation and minimising the deterrent effect of retaliation, whistleblower protection legislation is also necessary to protect a person's right to freedom of expression under art 10 of the European Convention of Human Rights ('ECHR')⁹⁹ and Article 40.6.1°(i) of Bunreacht na hÉireann ('Irish Constitution').¹⁰⁰ The European Court of Human Rights ('ECtHR') has deemed the freedom of expression as constituting one of the essential foundations of a democratic society, stating that it is 'one of the basic conditions for its progress and for the development of every man',¹⁰¹ and explained that this includes expressions that may be offensive, shocking, or disturbing.¹⁰² It has been recognised that due to the subjective belief element of whistleblowing that whistleblowing qualifies as speech

⁹⁷ *ibid* 45.

⁹⁸ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 7.

⁹⁹ Article 10 ECHR provides: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ... 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' European Convention on Human Rights and Fundamental Freedoms 4 November 1950, 213 UNTS221 (ECHR) art 10.

¹⁰⁰ Art 40.6.1°(i) states that 'The State guarantees liberty for the exercise of the following rights, subject to public order and morality: – i The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.' The right of freedom of opinion and expression is also provided for under the UN General Assembly, Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III), art 19, which states, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Further, the Charter of Fundamental Rights of the European Union [2016], art 11, provides that '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.'

¹⁰¹ *Handyside v United Kingdom* [1976] ECHR 5 [49].

¹⁰² *ibid*.

and therefore could attract the protection of freedom of expression.¹⁰³ The ECtHR has confirmed that art 10 ECHR applies to the workplace.¹⁰⁴ This protection, however, is not absolute and can be subject to interference, as long as the interference is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. In order to determine whether an interference is lawful in a whistleblowing case, the ECtHR has generally applied six criteria,¹⁰⁵ which are distilled by and set out in the explanatory memorandum to the Council of Europe's Recommendation (2014)7 on the Protection of Whistleblowers, as:

- i. whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure;
- ii. the public interest in the disclosed information. The Court in *Guja v. Moldova* noted that “in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”;
- iii. the authenticity of the disclosed information. The Court in *Guja v. Moldova* reiterated that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. The Court in *Bucur and Toma v. Romania* bore in mind Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe and the need to protect whistleblowers on the basis that they had “reasonable grounds” to believe that the information disclosed was true;
- iv. detriment to the employer. Is the public disclosure so important in a democratic society that it outweighs the detriment suffered by the employer? In both *Guja v. Moldova* and *Bucur and Toma v. Romania* the employer was a public body and the Court balanced the public interest in maintaining public confidence in these public bodies against the public interest in disclosing information on their wrongdoing;
- v. whether the disclosure is made in good faith. The Court in *Guja v. Moldova* stated that “an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection”;

¹⁰³ Björn Fasterling, ‘Whistleblower protection: A Comparative law perspective’ in AJ Brown (ed), *Whistleblowing in the Australian Public Sector Enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press 2008) 334.

¹⁰⁴ *Guja v Moldova* [2008] ECHR 144 [52].

¹⁰⁵ In *Matuz v Hungary* [2014] ECHR 1112 [35], the ECtHR added an additional principle to those set down in *Guja* and stated that ‘the fairness of proceedings and the procedural guarantees afforded ... are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.’

vi. the severity of the sanction imposed on the person who made the disclosure and its consequences.¹⁰⁶

The *Guja* principles, as reflected in the explanatory memorandum above, have been described as setting a ‘relatively high threshold for applicants to overcome before protection may be obtained.’¹⁰⁷ Lewis et al argue that this protection is ‘not an adequate substitute for providing specific incentives or protection for the bulk of whistleblowing’¹⁰⁸ and that in advance of making their disclosure, whistleblowers must know whether their actions will be supported and what remedies may be afforded to them.¹⁰⁹ The proportionality test applied by the ECtHR means that the discloser’s freedom of expression would be weighed against the interests of the employer, thus resulting in uncertainty of protection for disclosers. The proportionality test for whistleblowing cases established in *Guja*, has been applied in subsequent cases, such as, in the case of *Heinisch v Germany*,¹¹⁰ where the ECtHR stated ‘the Court finds that the public interest in having information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter’s business reputation and interests.’¹¹¹ Also, in *Rubins v Latvia*,¹¹² although the ECtHR did not apply the *Guja* principles in their entirety, it applied a proportionality test and stated:

In the context of employment disputes the Court has noted that employees owe to their employer a duty of loyalty, reserve and discretion (see, for instance, *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009, *Heinisch v. Germany*, no. 28274/08, § 64, ECHR 2011 (extracts)), and that in striking a fair balance the limits of the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment must be taken into account (see *Palomo Sánchez and Others*, cited above, § 74).¹¹³

¹⁰⁶ Explanatory Memorandum to the Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers’ Deputies (SPDP Council of Europe 2014) para 53. The order of the principles are the same as set out in *Bucur and Toma v Romania* [2013] ECHR 14. The explanatory memorandum explains at paras 51 and 53 that the principles derived from the case law of the ECtHR, apply to external disclosures, ie outside the employment or regulatory relationship.

¹⁰⁷ Ashley Savage, *Leaks, Whistleblowing and the Public Interest, The Law of Unauthorised Disclosures* (Edward Elgar 2016) 139.

¹⁰⁸ David Lewis, Tom Devine and Paul Harpur, ‘The key to protection: Civil and employment law remedies’ in AJ Brown (ed), *Whistleblowing in the Australian Public Sector Enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press 2008) 351.

¹⁰⁹ *ibid*.

¹¹⁰ *Heinisch v Germany* [2011] ECHR 1175.

¹¹¹ *ibid* [90].

¹¹² *Rubins v Latvia* [2015] ECHR 2.

¹¹³ *ibid* [78].

Thus, when weighing up the conflicting interests of an employee and an employer, the nature and extent of the duty of loyalty will have an impact on this assessment.¹¹⁴

The authenticity test is also relevant to the balancing exercise. However, requiring the discloser to verify the contents of the information to be disclosed carefully in order to determine whether it is accurate and reliable, subject to the extent permitted by the circumstances,¹¹⁵ can be considered a restrictive criterion. The application of this test has been criticised for being unclear in respect of how the authenticity criterion is applied, especially when contrasted with the tests to be applied under national whistleblowing legislation in relation to a discloser's reasonable belief for different levels of disclosure.¹¹⁶ A further restrictive feature of the case law of the ECtHR is the requirement of good faith.¹¹⁷ This requirement can be considered anachronistic and does not feature in some national whistleblower protection legislation,¹¹⁸ whilst in others, it is merely a remedy issue and does not deprive a discloser of protection.¹¹⁹ The Kosovan draft Law on Protection of Whistleblowers specifically provides that neither the good faith test nor the authenticity test needs to be satisfied by the discloser, stating that 'The whistleblower is not required to prove

¹¹⁴ Ashley Savage, *Leaks, Whistleblowing and the Public Interest, The Law of Unauthorised Disclosures* (Edward Elgar 2016) 136.

¹¹⁵ *Guja v Moldova* [2008] ECHR 144 [75].

¹¹⁶ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 18.53(7). For example, the UK's Public Interest Disclosure Act 1998 (the provisions of which were incorporated into the Employment Rights Act 1996, ss 43C-H) prescribes different tests to be met depending on the channel through which the disclosure is made. This approach is also adopted in the Protected Disclosures Act 2014, ss 6-10.

¹¹⁷ An example of a case where an applicant was unsuccessful in their claim of an unlawful interference with their rights under art 10 where motivation was a factor was in the decision of *Langner v Germany* [2015] ECHR 803. The applicant in this case was the head of the sub-division in charge of sanctioning misuse of housing property in the Housing Office who accused the Deputy Mayor for Economy and Housing, at a meeting of the staff of the Housing Office, of having committed a perversion of justice by ordering the issuing of an unlawful demolition permit for a block of flats. The domestic court had found that the purpose of the applicant's statement was not aimed at uncovering an unacceptable situation within the Housing Office, but was motivated by the applicant's personal misgivings about the Deputy Mayor, arising from the prospect of the impending dissolution of his sub-division. The ECtHR held on that basis at para 47 that 'The current case has therefore to be distinguished from cases of "whistle-blowing", an action warranting special protection under Article 10 of the Convention, in which an employee reports a criminal offence in order to draw attention to alleged unlawful conduct of the employer'.

¹¹⁸ For example, the Italian whistleblowing law, Legislative Decree 2001/165, s 54-bis, amended by Law No 2017/179 (Provisions for the protection of whistleblowers). The omission of a good faith test can also be seen in whistleblowing statutes in countries outside of the EU, eg the Australian Public Interest Disclosure Act 2013 and the Serbian Law on the Protection of Whistleblowers Act, no 2014/128.

¹¹⁹ In the UK, the Enterprise and Regulatory Reform Act 2013, s 18(5), which inserts s 123(6A) into Employment Rights Act 1996, provides that compensation awarded in a detriment claim can be reduced by up to 25% if the disclosure was not made in good faith. This position is reflected in Ireland where compensation awarded in a penalisation claim can be reduced by up to 25% if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure. Protected Disclosures Act 2014, sch 2, s 1(4); Unfair Dismissals Act 1977, s 7(2B), as inserted by Protected Disclosures Act 2014, s 11(1)(e).

his or her good faith and authenticity of reported information.’¹²⁰ The ECtHR may wish to revisit this good faith test in cases before it when the draft EU Commission Directive on whistleblowing is adopted, as it does not contain a good faith test.¹²¹

Lewis et al conclude that despite the protections under convention and constitutional provisions, both employment law and civil law remedies will ‘remain the backbone of achieving more effective whistleblowing regimes.’¹²² Therefore, although whistleblowers may be protected in relation to their freedom of expression under constitutional and human rights law, it is vital that specific legislation is introduced to protect whistleblowers exercising that right. The risk with specific whistleblowing legislation, however, is that it may limit the circumstances under which a discloser may be protected, and therefore a legal system should offer both basic freedom of expression guarantees and specific statutory provisions for disclosures and protections.¹²³

2.5 What is ‘protection’?

Protection from reprisal for whistleblowers requires the establishment of pro-active legislative measures. The awarding of compensation under whistleblowing legislation to a person who has suffered professional or personal retaliation for having made a protected disclosure is a limited reactive measure. An award of compensation may amount to a deterrent effect for employers and others from the taking of action against whistleblowers; however, this is an individual remedy and may not be sufficient to ensure the protection of others who blow the whistle. This anti-retaliation model for whistleblower protection law has been held to be unsuccessful in both the US and Australia.¹²⁴ In order for legislative protection to be successful, there must be an integrated approach. Dworkin and Brown have identified four legislative models for whistleblowing law: (i) anti-retaliation or organizational justice; (ii) reward or bounty;¹²⁵ (iii) institutional or structural; and (iv) public

¹²⁰ Draft Law on Protection of Whistleblowers, art 9(2).

¹²¹ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD).

¹²² David Lewis, Tom Devine and Paul Harpur, ‘The key to protection: Civil and employment law remedies’ in AJ Brown (ed), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 352.

¹²³ Björn FASTERLING, ‘Whistleblower protection: A Comparative law perspective’ in AJ Brown (ed), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 335.

¹²⁴ Terry Morehead Dworkin and AJ Brown, ‘The Money or the Media: Lessons from Contrasting Developments in US and Australian Whistleblowing Laws’ (2013) 11 *Seattle Journal For Social Justice* 653.

¹²⁵ The issue of rewards/bounties is outside of the scope of the research undertaken for this thesis.

or media.¹²⁶ Dworkin and Brown recognise that these models can compete with one another and due to the differing underlying perspectives of whistleblower legislation¹²⁷ that it can be difficult to achieve an integrated approach.¹²⁸ Nonetheless, they conclude that ‘legislative efforts that effectively integrate and reconcile these different approaches provide the most likely path to greater success in protecting whistleblowers and encouraging whistleblowing.’¹²⁹ Therefore, protection for whistleblowers requires pro-active measures to be established, in addition to anti-retaliation measures.

There are proactive measures that can be introduced in whistleblowing protection legislation. For example, under the third legislative model identified by Brown and Dworkin, the ‘institutional or structural’ model, this can include a requirement to provide for effective communication channels, which does not have to be limited to internal disclosure channels but can also include external communication channels.¹³⁰ Internal disclosure channels would include the imposition of a requirement on organisations to establish mandatory whistleblowing procedures or incentivising organisations to establish whistleblowing procedures.¹³¹ External communication channels could include the establishment of a whistleblowing ombudsman,¹³² a national whistleblowing authority/agency (public sector and/or private sector),¹³³ or prescribed persons.¹³⁴ A recent study established that there is a trend to establish governmental whistleblowing agencies to implement whistleblowing

¹²⁶ Terry Morehead Dworkin and AJ Brown, ‘The Money or the Media: Lessons from Contrasting Developments in US and Australian Whistleblowing Laws’ (2013) 11 *Seattle Journal For Social Justice* 653, 656.

¹²⁷ Vaughan suggests that there are four perspectives of whistleblowers laws: (i) The Employment Perspective; (ii) The Open-Government Perspective; (iii) The Market-Regulation Perspective; and (iv) The Human Rights Perspective. Robert G Vaughan, ‘Perspectives’ in Robert G Vaughan (ed), *Whistleblowing Law Volume I* (Edward Elgar 2015) 267-289.

¹²⁸ Terry Morehead Dworkin and AJ Brown, ‘The Money or the Media: Lessons from Contrasting Developments in US and Australian Whistleblowing Laws’ (2013) 11 *Seattle Journal For Social Justice* 653, 705.

¹²⁹ *ibid* 713.

¹³⁰ Björn Fasterling, ‘Whistleblower protection: A Comparative law perspective’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 339.

¹³¹ For example, Australia: Public Interest Disclosure Act 2012, s 33(1); Canada: Public Servants Disclosure Protection Act 2005, s 10; France: LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), art 8; Kosovo: Draft Law on Protection of Whistleblowers 2018, art 28(1); The Netherlands: Whistleblowers Centre Act 2016, s 2(1); New Zealand: Protected Disclosures Act 2000, s 11; Norway: Working Environment Act 2005, s 2A-3; Serbia: Law on the Protection of Whistleblowers Act, no 2014/128, art 16; UK: Bribery Act 2010, s 7(2); US: Sarbanes-Oxley Act 2002, s 406.

¹³² Australia, Belgium, Israel, France.

¹³³ UK: National Guardian Office; The Netherlands: Whistleblowers Authority; Republic of Korea: Anti-Corruption and Civil Rights Commission (‘ACRC’); US: Office of Special Counsel (‘OSC’), Securities and Exchange Commission (‘SEC’), Office of the Whistleblower (‘OWB’) within the SEC, and the Merit Systems Protection Board (‘MSPB’).

¹³⁴ UK and now Ireland.

legislation.¹³⁵ However, the study identified that of those agencies established in the countries included in the study,¹³⁶ there were different tasks associated with their role, ie provision of information, advice and/or support;¹³⁷ investigation or referral of the wrongdoing disclosed;¹³⁸ investigation of a claim of retaliation suffered by the discloser;¹³⁹ and/or prevention.¹⁴⁰ The study held the Dutch Whistleblowers Authority ('Huis voor klokkenluiders') as standing out in relation to the agencies assessed in respect of the services that it provides, despite the recent criticism levied at it.¹⁴¹ The Dutch Whistleblowers Authority provides services to both the public and private sector, and these services include the provision of free, confidential advice, as well as information on integrity policy and achieving an open organisational culture. If requested, it may initiate an investigation into the abuse disclosed and/or the treatment of the whistleblower. However, according to its annual reports in 2016 and 2017, it failed to complete an investigation.¹⁴²

The study acknowledged the emphasis on the importance of the provision of whistleblower protection in a holistic manner, whilst also recognising that there is a lack of research into the effectiveness of such an approach.¹⁴³ The study found that only the Dutch¹⁴⁴ and

¹³⁵ Kim Loyens and Wim Vandekerckhove, 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements' (2018) 8(3) Administrative Sciences 12 <<https://www.mdpi.com/2076-3387/8/3/30/htm>> accessed 31 March 2019.

¹³⁶ *ibid* 3. The study was commissioned by the Dutch Whistleblowers Authority and looked at whistleblowing agencies in eleven countries from June 2017 to February 2018. The countries selected were within the Council of Europe and G20 and had both designated whistleblowing legislation and institutions that had a certain level of comparability with the Dutch Whistleblowers Authority.

¹³⁷ Australia, Belgium, Israel, The Netherlands, Norway, and US (OWB).

¹³⁸ Australia, Belgium, Israel, The Netherlands, and US (SEC).

¹³⁹ Belgium, Israel, France, The Netherlands, Republic of Korea, and US (OSC and MSPB).

¹⁴⁰ Australia, The Netherlands, UK, and US (OSC).

¹⁴¹ Kim Loyens and Wim Vandekerckhove, 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements' (2018) 8(3) Administrative Sciences 12 <<https://www.mdpi.com/2076-3387/8/3/30/htm>> accessed 31 March 2019.

¹⁴² According to its 2016 annual report, the Dutch Whistleblowers Authority received twelve requests for investigations. At the end of 2016, there were four investigations ongoing, six were waiting for information, two were not taken for investigation or considered not admissible, and none were closed. Whistleblowers Authority, 'Annual Report 2016' (Whistleblowers Authority March 2017) 12 <<https://huisvoorklokkenluiders.nl/wp-content/uploads/2018/07/Annual-Report-Whistleblowers-Authority-2017.pdf>> accessed 23 March 2019; According to its 2017 annual report, the Dutch Whistleblowers Authority received nineteen requests for investigations, of which three requests were accepted. At the end of 2017, seven investigations were ongoing and none had been completed. Whistleblowers Authority, 'Annual Report 2017' (Whistleblowers Authority March 2018) 9-10 <<https://huisvoorklokkenluiders.nl/wp-content/uploads/2018/07/Annual-Report-Whistleblowers-Authority-2017.pdf>> accessed 23 March 2019.

¹⁴³ Kim Loyens and Wim Vandekerckhove, 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements' (2018) 8(3) Administrative Sciences 13 <<https://www.mdpi.com/2076-3387/8/3/30/htm>> accessed 31 March 2019.

¹⁴⁴ The Dutch Whistleblowers Authority can refer a discloser to an external psychologist who is familiar with the psychosocial problems that whistleblowers can suffer from. Whistleblowers Authority, 'Annual Report 2016' (Whistleblowers Authority March 2017) 7 <<https://huisvoorklokkenluiders.nl/wp-content/uploads/2018/07/Annual-Report-Whistleblowers-Authority-2017.pdf>> accessed 23 March 2019.

Norwegian¹⁴⁵ governments currently provide funds for specific psychosocial care for whistleblowers and that the Israeli Ombudsman is going to provide a similar service in the future.¹⁴⁶

Further institutional or structural provisions in whistleblower protection legislation could include a requirement to conduct risk assessments of retaliation against disclosers. For example, in Australia, the Public Interest Disclosure Act 2012, requires a public sector entity's procedures to include '(a) clear obligations on the entity and its public officials to take action to protect disclosers; and (b) risk management steps for assessing and minimising— (i) detrimental action against people because of public interest disclosures; and (ii) detriment to people against whom allegations of disclosable conduct are made in a disclosure.'¹⁴⁷ Further, under the Australian Public Interest Disclosure Act 2013, the principal officer of an agency must establish procedures for facilitating and dealing with public interest disclosures relating to the agency and those procedures must include assessing risks that reprisals may be taken against the person who makes those disclosures.¹⁴⁸ Brown and Olsen emphasise the importance of risk assessments and state:

[T]he accurate, objective assessment of risk is a precondition for the effective management of many whistleblowing incidents. Unless an agreed understanding is reached about the sources and levels of risk from an early point in the reporting process, the prospects for successfully managing either the expectations or the real experiences of whistleblowers are immediately more doubtful. Risk assessment is crucial to closing the gaps in whistleblowers' understanding of how others might perceive their report and reducing the potential for conflict, including conflict with management about whether effective support was provided.¹⁴⁹

¹⁴⁵ The psychosocial care clinic for whistleblowers who have suffered retaliation is funded by the Norwegian Ministry of Health. This clinic has provided psychosocial care to more than 200 whistleblowers since its establishment in 2012. According to the study carried out by Loyens and Vandekerckhove, this clinic will probably be closed down due to financial constraints, which is the official reason, but also according to an interviewee in the study, it is because the Norwegian government feels uncomfortable with the existence of the clinic due to a perception that the clinic is a 'symptom of a culture that is against whistleblowers and freedom of speech.' Kim Loyens and Wim Vandekerckhove, 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements' (2018) 8(3) Administrative Sciences 11 <<https://www.mdpi.com/2076-3387/8/3/30/htm>> accessed 31 March 2019.

¹⁴⁶ *ibid.*

¹⁴⁷ Public Interest Disclosure Act 2012, s 33(2).

¹⁴⁸ Public Interest Disclosure Act 2013, s 59(1)(a).

¹⁴⁹ AJ Brown and Jane Olsen, 'Whistleblower mistreatment: identifying the risks' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector Enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press 2008) 145.

Other institutional or structural provisions in whistleblower protection legislation could include requirements relating to the provision of training and education¹⁵⁰ on issues associated with whistleblowing and whistleblower protection. Moberly argues that ‘Training supervisors could provide a solution to the problem of managers misperceiving a whistleblower’s motivations or not responding appropriately to whistleblowers’.¹⁵¹ There is evidence that training managers about how to deal with cases where employees have reported wrongdoing can increase managers preparedness to intervene when: (i) co-workers cease to associate with the employee at work; (ii) co-workers begin spreading rumours about the employee; (iii) a manager makes negative comments about the employee’s personality; and (iv) a manager plans to refer the employee for psychiatric assessment.¹⁵²

Therefore, whistleblower protection laws cannot consist of simply providing compensation when retaliation occurs. Robust whistleblower protection legislation must also provide for proactive measures to be taken by recipients of disclosures in order to reduce the risk of retaliation against a discloser.

2.6 History of whistleblowing in Ireland

It has been suggested that in Ireland the concept of whistleblowing is contentious given the historical connotations of informing on a person.¹⁵³ Since Ireland’s political dominance by Britain, native informers were widely perceived to have assisted the British authorities in their rule of Ireland. ‘Informer’ became synonymous with ‘traitor’.¹⁵⁴ This perception was evidenced during the Irish War of Independence when 184 civilians who were accused of

¹⁵⁰ For example, the UK’s Freedom to Speak Up National Guardian’s Office provides advice, guidance, and training for Freedom to Speak Up Guardians in the NHS. For more information, see: <www.cqc.org.uk/national-guardians-office/content/national-guardians-office> accessed 23 March 2019.

¹⁵¹ Richard Moberly, ‘To persons or organizations that may be able to effect action’: Whistleblowing recipients’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 289.

¹⁵² Wim Vandekerckhove, AJ Brown and Eva Tsahuridu, ‘Managerial responsiveness to whistleblowing: Expanding the research horizon’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 307-310, 312. Vandekerckhove, Brown, and Tsahuridu’s assessment of the impact of management training on how to deal with whistleblowers was based on the survey responses of 532 randomly selected managers in fifteen public sector organisations in Australia in 2007-08, undertaken as part of the ‘Whistling While They Work’ study. For more information on this study, see: AJ Brown, *Whistling in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU E Press 2008) and Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011).

¹⁵³ Henry Murdoch, ‘Touting for Business: The Rise of the Whistleblower’ (October 2003) Law Society Gazette 8.

¹⁵⁴ Transparency International Ireland, ‘An Alternative to Silence: Whistleblower Protection in Ireland’ (TII January 2010) 5.

spying were killed by the Irish Republican Army ('IRA').¹⁵⁵ The majority of these were shot dead and as Ó Ruairc explains 'As a warning to others their bodies were usually deposited in public places with an accompanying label reading 'Shot by IRA – Spies and informers beware!''¹⁵⁶

This attitude transgressed into modern times as can be seen in the 1973 case of *Berry v Irish Times*.¹⁵⁷ This case concerned a publication in the defendant's daily newspaper, which included a photograph of a man carrying a placard on which was written 'Peter Berry- 20th Century Felon Setter-Helped Jail Republicans in England'. Beneath the photograph, there was a news item about two Irishmen who were stated to be serving sentences of imprisonment after convictions in England for having taken part in a raid for arms in that country. The plaintiff, Peter Berry, who was head of the Department of Justice at the time, argued that the words meant and were understood to mean 'that the plaintiff had helped in the jailing of Irish republicans in England.'¹⁵⁸

Berry failed in his defamation case but Mr Justice McLoughlin dissenting commented:

He is called a felon setter because he has designated republicans, by giving information as to names and locations, addresses perhaps in England, and so assisted to have such persons jailed. Put in other words, the suggestion is that this Irishman, the Plaintiff, has acted as a spy and informer for the British police concerning republicans in England, thus putting the Plaintiff into the same category as the spies and informers of earlier centuries who were regarded as loathing and abomination by all decent people.¹⁵⁹

Even the Plaintiff himself stated 'I can think of nothing more ugly, more horrible in this life than to be called an informer. It has a peculiarly nauseating effect in Irish life.'¹⁶⁰

In 1999, during the second stage of the Dáil Debate on the Whistleblower Protection Bill 1999, a member of the Oireachtas stated that Irish people 'have an abhorrence of being called a tell-tale or of informing on another. This stems from our history when we were, for eight hundred years under the yoke of the British Crown.'¹⁶¹

¹⁵⁵ Pádraig Óg Ó Ruairc, 'Spies and Informers Beware!' (May–June 2017) 25(3) *History Ireland* 42, 42.

¹⁵⁶ *ibid* 45.

¹⁵⁷ *Berry v Irish Times* [1973] IR 368 (SC).

¹⁵⁸ *ibid* 372.

¹⁵⁹ *ibid* 379–80.

¹⁶⁰ *ibid* 380.

¹⁶¹ Dáil Deb 16 June 1999, vol 506. It is not only in Ireland that there has been a negative attitude towards those who blow the whistle on wrongdoing. Across the ten EU countries surveyed in Transparency International's 'Alternative to Silence' Report, the term 'whistleblower' was found to be associated with informant (eg Czech Republic, Romania and Slovakia), a traitor or spy (eg Bulgaria, Italy) and/or a snitch (eg Estonia, Hungary,

Despite this historical attitude, there have been a number of high profile whistleblowers in Ireland who put their head above the parapet, including Tom Clonan who blew the whistle on the sexual harassment of women in the Defence Forces; Eugene McErlean, an internal auditor, who uncovered the overcharging of AIB customers and reported it to the Financial Regulator; Louise Bayliss who went public over plans to keep mental health patients in a locked unit over the Christmas period; Bernadette Sullivan, a former nurse who blew the whistle on Dr Michael Shine, who sexually assaulted a number of boys at Our Lady of Lourdes Hospital, Drogheda; and assistant principal officer Marie Mackle in the Department of Finance who consistently warned about an overheating property market during 2005 and 2006. Nonetheless, it took the controversy surrounding Garda whistleblower, former Sergeant Maurice McCabe ('McCabe'), to bring to the fore the maltreatment of many whistleblowers in Ireland.

There has been a sea of change in Ireland towards whistleblowers and whistleblowing since the treatment of McCabe, by those in the highest echelons of public life, came to light. A 'storm of public controversy'¹⁶² followed the comments made by former Garda Commissioner Martin Callinan ('Callinan') in relation to McCabe and another Garda whistleblower, John Wilson ('Wilson'), during a hearing of the Dáil's Public Accounts Committee on 23 January 2014 into the management of the fixed charge notice system, when he made the following statement:

Clearly, here, however, we have two people, out of a force of over 13,000, who are making extraordinary and serious allegations. There is not a whisper anywhere else or from any other member of the Garda Síochána, however, about this corruption, malpractice and other charges levelled against their fellow officers. Frankly, on a personal level I think it is quite disgusting.¹⁶³

McCabe and Wilson had raised a number of concerns regarding certain practices and procedures in the force, in particular, corruption in the form of the quashing of penalty points in illegitimate circumstances, which resulted in a loss of millions of euro of potential revenue

Latvia and Lithuania). Transparency International, 'Alternative to Silence, Whistleblower Protection in 10 European Countries' (TI 2009) 7. In addition, the Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", provides in para 7 that 'the Assembly stresses that the necessary legislative improvements must be accompanied by a positive evolution of the general attitude towards whistleblowing which must be freed from its previous association with disloyalty and betrayal.'

¹⁶² Tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters, *Third Interim Report* (11 October 2018) 195.

¹⁶³ Public Accounts Committee Deb 23 January 2014.

to the exchequer.¹⁶⁴ There were various investigations into the disclosures,¹⁶⁵ culminating in the Disclosure Tribunal ('Charleton Tribunal'), which investigated the treatment of McCabe.¹⁶⁶

It was determined in the Charleton Tribunal that there was a campaign of calumny against McCabe by Callinan and that he was actively aided in this campaign by his press officer Superintendent David Taylor.¹⁶⁷ Mr Justice Charleton remarked on the treatment of McCabe, stating that:

What has been unnerving about more than 100 days of hearings in this tribunal is that a person who stood up for better standards in our national police force, Sergeant Maurice McCabe, and who exemplified hard work in his own calling, was repulsively denigrated for being no more than a good citizen and police officer ... The question has to be asked as to why what is best, what demands hard work, is not the calling of every single person who takes on the job of service to Ireland. Worse still is the question of how it is that decent people, of whom Maurice McCabe emerges as a paradigm, are so shamefully treated when rightly they demand that we do better.¹⁶⁸

Both the O'Higgins Commission and the Charleton Tribunal spoke highly of McCabe. Mr Justice O'Higgins described McCabe in the following terms:

Sergeant McCabe acted out of genuine and legitimate concerns, and the commission unreservedly accepts his bona fides. Sergeant McCabe has shown courage, and performed a genuine public service at considerable personal cost. For this he is due the gratitude, not only of the general public, but also of An Garda Síochána. While some of his complaints have not been upheld by this commission, Sergeant McCabe is a man of integrity, whom the public can trust in the exercise of his duties. Assistant

¹⁶⁴ In its report on the Fixed Charge Processing System, the Garda Inspectorate stated that in respect of Fixed Charge Notice summonses in the period from 2011-12 'the Inspectorate, using C&AG figures, conservatively estimates the potential Exchequer revenue loss from the non-payment of the FCNs resulting in unserved summonses to be a minimum of €7.4 million.' Garda Inspectorate, 'The Fixed Charge Processing System A 21st Century Strategy' (February 2014) 24.

¹⁶⁵ Assistant Commissioner Derek Byrne and Chief Superintendent Terry McGinn, 'Byrne/McGinn report' (11 October 2010) (Internal report); Deputy Commissioner Nacie Rice Report into the Byrne/McGinn investigation (8 March 2011) (Internal report); Assistant Commissioner John O'Mahoney, 'Report on Allegations of Irregularities in the Operation of the Fixed Charge Processing System (FCPS)' (15 May 2013); Comptroller and Auditor General, 'Report on the Accounts of the Public Services 2012' (September 2013) 89-110; Garda Inspectorate, 'The Fixed Charge Processing System A 21st Century Strategy' (February 2014); Seán Guerin 'Report to An Taoiseach, Enda Kenny TD on a Review of the Action Taken by An Garda Síochána Pertaining to Certain Allegations made by Sergeant Maurice McCabe (6 May 2014); and O'Higgins Commission of Investigation, 'Commission of Investigation (Certain Matters Relative to the Cavan/Monaghan Division of the Garda Síochána' (25 April 2016).

¹⁶⁶ The 'Disclosure Tribunal'/ 'Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters following Resolutions' (*Disclosure Tribunal*) <www.disclosuretribunal.ie/> accessed 20 February 2019.

¹⁶⁷ Tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters, *Third Interim Report* (11 October 2018) 275.

¹⁶⁸ *ibid* 301.

Commissioner Byrne told the commission that, “Sergeant McCabe is regarded as a highly efficient sergeant, competent”. This assessment is shared by the commission.¹⁶⁹

Mr Justice Charleton concluded that:

Maurice McCabe has done the State considerable service by bringing these matters to the attention of the wider public and he has done so not out of a desire to inflate his public profile, but out of a legitimate drive to ensure that the national police force serves the people through hard work and diligence. He is an exemplar of that kind of attitude. Notwithstanding everything that happened to him, he remains an officer of exemplary character and has shown himself in giving evidence to the tribunal as being a person of admirable fortitude.¹⁷⁰

The controversy resulted in changes to the penalty points system,¹⁷¹ as well as the resignation of two Garda Commissioners, two Ministers for Justice, one confidential recipient in the Garda Síochána, and a Secretary General of the Department of Justice and Equality. Further, it shone a light on the necessity for robust whistleblower protection, the requirement for employers to respond appropriately to whistleblowing, as well as being a catalyst for improving the public perception of whistleblowers.¹⁷²

¹⁶⁹O’Higgins Commission of Investigation, ‘Commission of Investigation (Certain Matters Relative to the Cavan/Monaghan Division of the Garda Síochána)’ (25 April 2016) 24.

¹⁷⁰ Tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters, *Third Interim Report* (11 October 2018) 288.

¹⁷¹ For example, a Criminal Justice (Fixed Charge Processing System (FCPS)) Working Group, was established, which consists of the Department of Justice and Equality; Courts Service; the Department of Transport, Tourism and Sport; the Garda Síochána; the Road Safety Authority; the Office of the Director of Public Prosecutions; the Revenue Commissioners; the Department of Housing, Planning and Local Government; and the Office of the Attorney General. A consolidated manual on the FCPS was also completed, which incorporated all directives and circulars relating to the FCPS. Further, training on the FCPS has been provided to new and existing members. In addition, the Fixed Charge Processing Office has assumed full responsibility for the administration of the National Tracking Allocation System. For more information on the changes made to the FCPS, see: Criminal Justice (Fixed Charge Processing System) Working Group ‘Tabular report on the implementation of the Recommendations of the Ninth Report of the Garda Síochána Inspectorate – ‘The Fixed Charge Processing System: A 21st Century Strategy’ (July 2018).

¹⁷² McCabe and Wilson won a ‘People of the Year Award’ in 2014’. People of the year awards, ‘Previous Winners’ (*People of the year awards*) <www.peopleoftheyear.com/previous-winners/> accessed 17 February 2019; McCabe was also awarded the ‘Ambassador of the Year Award for Road Safety and Road Victims’ in 2016 by the Irish Road Victims’ Association. At the award ceremony, it was announced that the award was being made to McCabe ‘For his very courageous endeavours at great personal cost, for the good of all of us’. Michael Clifford, *A Force for Justice The Maurice McCabe Story* (Hachette Books Ireland 2017) 354; Further, McCabe was awarded a ‘Special Recognition Award’ in the ‘Leading Lights in Road Safety Awards’ in 2018 by the Road Safety Authority. The reason for the award was explained on the basis that ‘Maurice has helped to ensure drivers with bad driving behaviours receive their due penalties, thereby helping to keep our roads safe for all of our families. He is being recognised as a Leading Light in road safety for all the work he has done in bringing the cancellation of penalty points to light and helping to bring about reform.’ Road Safety Authority, ‘Ireland’s Road Safety Champions presented with ‘Leading Light in Road Safety’ Awards for 2018’ (*Road Safety Authority*, 12 December 2018) <www.rsa.ie/en/Utility/News/2018/Irelands-Road-Safety-Champions-presented-with-Leading-Light-in-Road-Safety-Awards-for-2018/> accessed 17 February 2019.

2.7 The development of whistleblowing law in Ireland

2.7(a) *The sectoral approach to whistleblowing law*

The position in Ireland originally as regards whistleblowing and whistleblower protection involved a sectoral approach. A sectoral approach to whistleblower protection required the passing of legislation to protect potential whistleblowers in selected state, private, or professional sectors. The approach did not offer protection to everyone.¹⁷³ The CLRG in its 2007 Report stated that it was the understanding of the Review Group that the sectoral approach ‘implies confining consideration of the appropriateness of whistleblowing and related protection, to breaches of the legislation under consideration.’¹⁷⁴ The sectoral approach was formalised in 2006.

Prior to the formal adoption of the sectoral approach to whistleblower protection, there were a number of whistleblower protection provisions in place. For example, these provisions related to the protection of: persons reporting suspicions of child abuse or neglect to authorised persons;¹⁷⁵ persons reporting alleged breaches of the Ethics in Public Office Acts;¹⁷⁶ persons reporting competition law to the relevant authority (and also protections specific to employees for doing so);¹⁷⁷ employees against penalisation for exercising any right under the Safety, Health and Welfare at Work Act 2005;¹⁷⁸ and Gardaí and Garda civilian employees reporting corruption or malpractice in the police force.¹⁷⁹

In March 1999, a Private Members’ bill, the Whistleblowers Protection Bill 1999 (‘1999 Bill’)¹⁸⁰ was published by the Labour Party as a result of a series of political corruption

¹⁷³ Transparency International Ireland, ‘An Alternative to Silence: Whistleblower Protection in Ireland’ (TII January 2010) 4.

¹⁷⁴ Company Law Review Group, ‘Report of the Company Law Review Group 2007’ (CLRG 2007) para 6.4.2.

¹⁷⁵ Protections for Persons Reporting Child Abuse Act 1998, s 4.

¹⁷⁶ Under the Ethics in Public Office Act 2001, the Standards in Public Office Commission are empowered to investigate complaints about alleged contraventions of the Ethics in Public Office Acts. The Ethics in Public Office Acts 1995 to 2001, s 5, governs complaints by civil servants against other civil servants.

¹⁷⁷ Competition Act 2002, s 50.

¹⁷⁸ Safety, Health and Welfare at Work Act 2005, s 27.

¹⁷⁹ Garda Síochána Act 2005, s 124.

¹⁸⁰ The Whistleblowers Protection Bill 1999 was introduced by the Labour Party on 24 March 1999. Former Deputy Pat Rabbitte, at the First Stage of the Bill, sought that ‘leave be granted to introduce a Bill to provide protection from civil liability and penalisation to employees who make certain protective disclosures in relation to the affairs of their employers and to provide for related matters, The Whistleblowers Protection Bill, 1999.’ Dáil Deb 24 March 1999, vol 502. The Whistleblowers Protection Bill 1999 is available at: <www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/1999/1699/default.htm> accessed 17 February 2019.

scandals.¹⁸¹ Former Deputy Pat Rabbitte, who originally introduced the 1999 Bill, stated that the purpose of the Bill was ‘to challenge and help transform the traditional culture of secrecy that surrounds the conduct of business and public affairs in this country.’¹⁸² The 1999 Bill proposed a set of new statutory rights for employees, whether in the public or private sector, to report and transmit information they received of illegality or malpractice during the course of their employment. The 1999 Bill was welcomed by government and was accepted, in principle, at Second Stage¹⁸³ and referred to the Dáil Select Committee on Enterprise and Small Business.¹⁸⁴ The then Minister for Finance, Charlie McCreevy TD, indicated during his statement on the report of the Committee of Public Accounts on the DIRT inquiry in the Dáil on 30 March 2000, that whistleblower provisions would be adopted through amendments to the 1999 Bill, stating:

The Sub-Committee further recommended that a scheme and procedure for bank officials to report suspected wrongdoing be introduced. I understand that the Tánaiste and Minister for Enterprise, Trade and Employment will be bringing forward proposals in this area in the near future. These are expected to take the form of amendments to the Whistleblowers Protection Bill 1999 which was initiated in the Dáil last year as a Private Member's Bill.¹⁸⁵

The 1999 Bill then spent the next seven years on the order paper through two parliaments (the government having been returned to power in the general election of 2002) receiving regular positive reference from the government yet without being enacted. The 1999 Bill was eventually dropped in 2006, on the basis of legal advice that indicated that such generic provisions would be unworkable in Ireland.¹⁸⁶ This legal advice was never made public.¹⁸⁷ Former Minister for Labour Affairs, Tony Killeen TD (‘Killeen’) elaborated on this decision stating ‘a single all-encompassing legislative proposal on whistleblowing would be complex and cumbersome, take considerable time to enact, and would not be user friendly to the general public.’¹⁸⁸

¹⁸¹ Transparency International Ireland, ‘An Alternative to Silence: Whistleblower Protection in Ireland’ (TII January 2010) 4.

¹⁸² Dáil Deb 15 June 1999, vol 506.

¹⁸³ *ibid.*

¹⁸⁴ Government Reform Unit, Department of Public Expenditure and Reform, ‘Protected Disclosures Bill 2013 Regulatory Impact Analysis’ (DPER July 2013) 4.

¹⁸⁵ Dáil Deb 30 March 2000, vol 517.

¹⁸⁶ Dáil Deb 4 April 2006, vol 617.

¹⁸⁷ Oireachtas Library and Research Service, ‘Spotlight: Disclosure of information: duty to inform and whistleblowing’ (L&RS 16 December 2011) 13.

¹⁸⁸ Dáil Deb 4 April 2006, vol 617.

In March 2006, prior to the official dropping of the 1999 Bill, the government decided that rather than introducing an overarching law on whistleblowing, Ministers would instead be required, where appropriate, to consider the inclusion of whistleblowing provisions in impending legislation for which they had responsibility. The decision was described in the following terms by Killeen as:

The Government decided on 7 March 2006 to formalise the sectoral approach as part of its policy in addressing the issue of whistleblowing by requiring Ministers, in consultation with the Office of the Parliamentary Counsel, with legislation either on the Government's legislative programme for the current Oireachtas session or currently in the course of preparation to include, where appropriate, whistleblowing provisions therein. Such an approach also acknowledges situations where the provision of whistleblowing provisions may not be appropriate.¹⁸⁹

Following the formal adoption of the sectoral approach, whistleblowing protection provisions were expanded and adopted over a range of different statutes, and these provisions took the form of either statutory mandatory disclosures or statutory voluntary disclosures. Oversight bodies were also established to oversee the enforcement of the legislation.¹⁹⁰

In January 2010, the 1999 Bill was reintroduced in the Dáil as a Private Members Bill, the Whistleblowers Protection Bill 2010. However, this fell on the dissolution of the government in February 2011.¹⁹¹ A further Bill, the Whistleblowers Protection Bill 2011, which again proposed a generic framework for whistleblower protection in the public and private sectors, was introduced by the Independent Group of Deputies¹⁹² but again lapsed on the dissolution of the thirty-first Dáil. During this time, the sectoral approach was the sole approach to whistleblower protection until the enactment of the 2014 Act.

2.7(b) The generic approach to whistleblowing law

The government of the thirty-first Dáil had included in its Programme for Government a commitment to introduce whistleblower legislation stating 'we will put in place a

¹⁸⁹ *ibid.*

¹⁹⁰ For example, the Standards in Public Office Commission; the Health and Safety Authority; the Health, Information and Quality Authority; the Pensions Board; the Office of the Director of Corporate Enforcement; the Irish Stock Exchange; the National Consumer Agency; the Data Protection Commissioner; the Central Bank of Ireland; the Competition Authority; the Property Services Regulatory Authority; and Revenue.

¹⁹¹ Government Reform Unit, Department of Public Expenditure and Reform, 'Protected Disclosures Bill 2013 Regulatory Impact Analysis' (DPER July 2013) 4.

¹⁹² *ibid.*

Whistleblowers Act to protect public servants that expose maladministration by Ministers or others, and restore Freedom of Information.’¹⁹³

The government initially intended for there to be a referendum on the issue of whistleblower protection in October 2011 at the same time as a referendum on reducing judges’ pay, a referendum on providing the Oireachtas with powers to conduct investigations, and the Presidential election.¹⁹⁴ The Taoiseach stated that the work ‘in respect of the preparation of the legislation for those is underway. They are being treated as a priority.’¹⁹⁵

Despite this, the plans for the referendum on whistleblower protection were abandoned as a result of a decision by the then Attorney General, Máire Whelan, in July 2011, to refuse to approve the wording of the referendum.¹⁹⁶ In response, the former Minister for Public Expenditure and Reform, Brendan Howlin (‘Howlin’), said that he hoped that the matter would go before voters in 2012.¹⁹⁷ Howlin had a personal interest in the matter as a result of pressure placed on him in 2000, when he was Labour’s justice spokesperson, to reveal the sources of information about alleged corruption in the Garda Síochána in Donegal to the Morris Tribunal. Howlin, in responding to questions during an Oireachtas debate on the matter stated:

I have more than a passing interest in the issue of whistleblowing, having had to traipse to the High Court and the Supreme Court to protect the rights of individuals to give information to Members of the House on allegations of wrongdoing. I know how stressful this can be. At one stage I was on the hazard for €500,000 in legal fees.¹⁹⁸

The government changed direction in 2012 in relation to their approach to whistleblower protection and instead began to focus on drawing up generic legislation.¹⁹⁹ The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012 (‘Draft Heads’) were published

¹⁹³ Department of the Taoiseach, ‘Programme for Government’ (*Department of the Taoiseach* 2011) 19 <www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_2011-2016.pdf> accessed 17 February 2019.

¹⁹⁴ Luke Cassidy, ‘Three referendums for one day’ *The Irish Times* (Dublin, 15 June 2011) <www.irishtimes.com/newspaper/breaking/2011/0615/breaking27.html> accessed 17 February 2019.

¹⁹⁵ Marie O’Halloran, ‘Three referendums to take place on election day’ *The Irish Times* (Dublin, 16 June 2011) <www.irishtimes.com/newspaper/ireland/2011/0616/1224299001126.html> accessed 17 February 2019.

¹⁹⁶ Shaun Connolly, ‘Plans for whistleblower referendum abolished’ *Irish Examiner* (Cork, 25 July 2011) <www.irishtimes.com/ireland/politics/plans-for-whistleblower-referendum-abandoned-162122.html> accessed 19 February 2019.

¹⁹⁷ *ibid.*

¹⁹⁸ Dáil Deb 24 January 2012, vol 752. For further information on the Morris Tribunal see: <www.morristribunal.ie> accessed 17 February 2019.

¹⁹⁹ *ibid.*

by Howlin on the 27 February 2012.²⁰⁰ Howlin said that his Department had ‘looked at best international practice’²⁰¹ and that the Draft Heads would use the UK and New Zealand legislation as templates.²⁰²

On welcoming the publication, Howlin stated:

This Government is committed to a significant political reform agenda. A key part of this, as set out in the programme for Government, is our commitment to legislate to protect whistleblowers who speak out against wrongdoing, or cover-ups, whether in public or the private sector. This could encompass, for example, criminal misconduct, corruption, the breach of a legal obligation, risk to health and safety, damage to the environment or gross mismanagement in the public service.

The Heads of Bill published today will provide, for the first time for employees in Ireland, a single overarching framework protecting whistleblowers in a uniform manner in all sectors of the economy. This is a huge advancement from the previous piecemeal approach where the patchwork of protections resulted in fragmented and confusing standards of protection. A key element of the proposed legislation is that it treats all parties equally and fairly within an integrated legal framework that is open and transparent.²⁰³

The Draft Heads were welcomed by many, including TII, with CEO John Devitt stating ‘this legislation could be as important as the original Freedom of Information Act in protecting the public interest. There are some improvements to be made, but I think we’re on the right track.’²⁰⁴ Risk Management International, the Irish-based specialists in strategic and operational risks and investigations, said that the legislation was ‘timely and badly

²⁰⁰ The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012.

²⁰¹ Whistleblowers Ireland, ‘Brendan Howlin promises the whistleblower legislation will be ‘best in the world’’ (*Whistleblowers Ireland*, 28 February 2012) <<http://whistleblowersireland.com/2012/02/28/brendan-howlin-promises-whistleblower-legislation-in-ireland-will-be-best-in-the-world/>> accessed 19 February 2019.

²⁰² At the time of publication of the Draft Heads, the UK’s Public Interest Disclosure Act 1998 (the provisions of which were incorporated into the Employment Rights Act 1996) was generally considered to represent an example of good practice. In 2009, the Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs and Human Rights deemed the UK legislation to be the model in this field of legislation as far as Europe is concerned. Pieter Omtzigt, ‘Explanatory Memorandum, The Protection of “whistle-blowers”’ (*Council of Europe*, 29 September 2009) para 37 <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302>> accessed 21 March 2019. Certain elements of the New Zealand Protected Disclosures Act 2000 have also been adopted into the Draft Heads. The drafters also looked at the South African Protected Disclosures Act 2000.

²⁰³ Department of Public Expenditure and Reform, ‘This Bill will protect whistleblowers who speak out against wrongdoing or cover ups, whether in public or the private sector’ (*DPER*, 27 February 2012) <www.per.gov.ie/en/this-bill-will-protect-whistleblowers-who-speak-out-against-wrongdoing-or-cover-ups-whether-in-public-or-the-private-sector-howlin/> accessed 19 February 2019.

²⁰⁴ Transparency International Ireland, ‘TI welcomes government proposals for new whistleblower legislation’ (*TII* 27 February 2012) <http://transparency.ie/news_events/ti-ireland-welcomes-government-proposals-new-whistleblower-legislation> accessed 19 February 2019.

needed'.²⁰⁵ Fianna Fáil²⁰⁶ welcomed the Draft Heads with Seán Flemming, the then public expenditure and reform spokesperson for the party, stating 'we welcome the Bill. We're very pleased that it is going to be broad-ranging and robust ... we support the principle of the Bill and we're pleased that it is coming so quickly.'²⁰⁷

The Irish Congress of Trade Unions ('ICTU') also welcomed the Draft Heads. In 2010, ICTU had called on the government to:

Introduce a robust set of legal rights, to protect workers in the public or private sector, so that they can disclose and report matters such as malpractice, misconduct, the violation of laws, rules, regulations, damage to health, safety or environment concerns, corruption and fraud and the 'cover up' of these employees who report wrongful conduct by their employers must be protected from reprisals.²⁰⁸

ICTU's Legal Affairs Officer Esther Lynch ('Lynch') said that the introduction of the Draft Heads 'represents a giant step in the right direction, but in order for the proposed measures to work, they must be backed by effective safeguards for whistleblowers and real sanctions for those who target them.'²⁰⁹ Lynch also said that while whistleblower protection legislation alone would not prevent wrongdoing, it was 'a necessary component and something trade unions have called for consistently. With effective whistleblower protection in place, wrongdoing can be quickly exposed.'²¹⁰

After the publication of the Draft Heads, the Joint Committee on Finance, Public Expenditure and Reform ('Committee') met six times during April-June 2012 and heard submissions on the legislation from interested parties such as ICTU, the Irish Business and Employers Confederation, IMPACT, TII, the Irish Nurses and Midwives Organisation, the National Union of Journalists, and the Irish Bank Officials Association. A report containing detailed observations on the legislation was then prepared by the Committee²¹¹ for Howlin

²⁰⁵ Deaglán De Bréadún, 'Group welcomes whistleblower law' *The Irish Times* (Dublin, 28 February 2012).

²⁰⁶ Fianna Fáil is an Irish political party. For more information, see: <www.fiannafail.ie> accessed 14 December 2018.

²⁰⁷ Deaglán De Bréadún, 'Whistleblower Bill to cover public and private sectors' *The Irish Times* (Dublin, 30 January 2012) <www.irishtimes.com/news/whistleblower-bill-to-cover-public-and-private-sectors-1.453932> accessed 17 February 2019.

²⁰⁸ Irish Congress of Trade Unions, 'ICTU Demands Protection for Workers Who Blow the Whistle' (*ICTU*, 18 January 2010) <www.ictu.ie/press/2010/01/18/ictu-demands-protection-for-workers-who-blow-the-whistle> accessed 17 February 2019.

²⁰⁹ Irish Congress of Trade Unions, 'Whistleblower law must be backed by effective protection and sanctions' (*ICTU*, 28 February 2012) <<http://www.ictu.ie/press/2012/02/28/-whistleblower-law-must-be-backed-by-effective-protection-and-sanctions/>> accessed 17 February 2019.

²¹⁰ *ibid.*

²¹¹ Joint Committee on Finance, Public Expenditure and Reform, *Report on hearings in relation to the Scheme of the Protected Disclosures in the Public Interest Bill, 2012* (31/FPER/010, 2012).

who had stated that he had ‘an open mind on this legislation and will happily embrace any ideas that might improve it.’²¹²

Following the publication of this report, the Protected Disclosures Bill 2013 (‘2013 Bill’) was published on 3 July 2013, with the 2013 Bill reaching Final Stage on 1 July 2014.

2.7(c) *The Protected Disclosures Act 2014*

The 2014 Act was welcomed as a move away from the preceding sectoral approach to whistleblowing law as it proposed to extend whistleblowing protections beyond the limited categories of people who were protected by the sectoral legislation. The sectoral protections were considered to be relatively weak when faced with powerful constituencies.²¹³ Further, due to the diffusion of the provisions across the statute book, there appeared to be a low incidence of their use in Ireland.²¹⁴ The sectoral system was also considered to have led to confusion, a lack of awareness of the protections, and a reduction in potential whistleblowing.²¹⁵ Also, TII’s analysis of the sectoral approach demonstrated that this approach to whistleblower protection was leaving thousands of people with little or no guidance or protection against legal action and retaliation for speaking out against wrongdoing.²¹⁶ In order to rectify these deficiencies, the government endeavoured to produce a robust, generic approach to whistleblower protection and the introduction of the 2014 Act fulfilled its commitment in the programme for government to introduce a single overarching framework for the protection of workers in the public, private, and non-profit sectors.

The aim of the 2014 Act has been described as ‘not merely mirroring international best practice, but as far as possible, representing a “best in class” legal framework.’²¹⁷ The main objectives of the 2014 Act are:

(i) To ensure the protection of workers in all sectors of the economy by applying the provisions of the 2014 Act to public, private, and non-profit organisations.

²¹² Joint Committee on Finance, Public Expenditure and Reform Deb 18 April 2012.

²¹³ Andrew Sheridan, ‘Blowing the Whistle’ (Aug/Sept 2010) Law Society Gazette 20, 22.

²¹⁴ *ibid* 23.

²¹⁵ Oireachtas Library and Research Service, ‘Spotlight: Disclosure of information: duty to inform and whistleblowing’ (L&RS 16 December 2011) 12.

²¹⁶ Transparency International Ireland, ‘An Alternative to Silence: Whistleblower Protection in Ireland’ (TII January 2010) 4.

²¹⁷ Organisation for Economic Co-operation and Development, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 173.

(ii) To provide for a ‘stepped’ disclosure regime in which a number of distinct disclosure channels are available (ie internal, regulatory, and external) and through which the worker can, subject to different evidential thresholds, make a protected disclosure.

(iii) To safeguard a worker who has made a protected disclosure from being subjected to detriment, as well as providing immunity against civil liability and criminal liability in certain circumstances.

(iv) To make available certain remedies providing redress for workers who suffer retaliation for having made a protected disclosure.

(v) To confer ‘protected disclosure’ status on disclosures made under existing sectoral whistleblowing legislation and to ensure, as much as possible, a uniform standard of protection.

(vi) To highlight employer’s responsibility of implementing effective internal mechanisms to investigate protected disclosures and to develop an organisational culture that supports disclosers, as a key element of corporate risk management overall, in order to identify potential or actual wrongdoing, and to take appropriate corrective action as soon as possible.²¹⁸

These objectives reflect the changing attitude towards whistleblowers in Ireland and appreciate the positive role that whistleblowers play in uncovering wrongdoings. They have been developed in a manner that moves away from the fragmented nature of the sectoral approach towards a more unified, all-encompassing whistleblower legislation.

At an early stage, it was considered that the enactment of the 2014 Act had ‘led to a significant change in the perceived environment for whistleblowing.’²¹⁹ Further, the 2014 Act has been lauded in the international sphere. For example, Blueprint for Free Speech, commenting on the 2014 Act, stated:

Perhaps no whistleblower law passed recently in Europe benefited from more public debate and expert input than Ireland’s Protected Disclosures Act (PDA).

Enacted in 2014, the law contains provisions that are among the strongest in Europe, if not the world. Several years of consistent campaigning by advocates, led by the Ireland chapter of Transparency International, ensured a law that contains nearly all

²¹⁸ Department of Public Expenditure and Reform, ‘Information Note on the General Scheme of the Protected Disclosure in the Public Interest Bill, 2012’ (DPER 2012) 1.

²¹⁹ Organisation for Economic Co-operation and Development, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 178.

key European standards for protecting and compensating people who report crime and corruption.

One important takeaway is that the high level of effectiveness and transparency of the lawmaking process itself has – thus far – nurtured effective and transparent enforcement of the PDA in real-life cases.²²⁰

In April 2018, the European Commission in a communication to the European Parliament, the European Council, and the European Economic and Social Committee, on strengthening whistleblower protection at EU level, listed Ireland as being one of ten Member States that have comprehensive whistleblowing legislation in place.²²¹

Further, in a study carried out by Blueprint for Free Speech in 2018, which measured the whistleblower laws and policies for all EU countries against nine key European and international standards, Ireland scored the highest mark, achieving a score of 67.7%.²²² Also, the positive light in which the 2014 Act is being viewed is reflected in Transparency International's 'A Best Practice Guide for Whistleblowing Legislation', which referred specifically to the 2014 Act on numerous occasions as being a good practice example of whistleblowing legislation.²²³

2.8 Conclusion

This chapter explored both the theoretical and historical contexts that shaped the 2014 Act. The theoretical reasons underpinning the purpose of the 2014 Act included firstly, the recognition that whistleblowers play a significant role in uncovering wrongdoing, which has been substantiated by a number of studies; and secondly, that whistleblowers need protection. The various studies carried out on the issue of whistleblower retaliation have demonstrated differing rates of suffering in a range of contexts, but it has been recognised that any retaliation is too much retaliation, and this can, to varying degrees, impact on whether an individual decides to blow the whistle.

²²⁰ Blueprint for Free Speech, 'Safe or Sorry: Whistleblower Protection Laws in Europe Deliver Mixed Results' (Blueprint for Free Speech 2018) 26.

²²¹ Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on strengthening whistleblower protection at EU level Brussels' COM(2018) 214 final.

²²² Blueprint for Free Speech, 'Gaps in the System: Whistleblower Laws in the EU' (Blueprint for Free Speech 2018) 5.

²²³ Transparency International, 'A Best Practice Guide for Whistleblowing Legislation' (TI 2018) 8, 9-10, 11, 15, 23, 24, 30, 35, 43, 55, and 62.

The historical context underpinning the drafting of the 2014 Act is both sensitive and complex. The attitude towards whistleblowers in Ireland has transgressed from an association of being a ‘spy’, ‘traitor’, or ‘informer’, to one that is much more positive of late, especially due to the McCabe controversy.

The 2014 Act was published some fifteen years after the first proposal of generic whistleblowing law. The original approach of the government of adopting whistleblowing provisions into sectoral legislation was ultimately considered to be confusing, fragmented, and of providing differing levels of protection to different workers in different sectors. The 2014 Act was intended to improve on the sectoral approach by providing a much more robust protection regime than the preceding sectoral approach. The question arises, however, whether the 2014 Act does provide robust protection to whistleblowers. In order to assist in this determination, the next chapter will look at the case law decided under the 2014 Act between 15 July 2014 and 16 July 2018.

Chapter 3: An analysis of case law under the Protected Disclosures Act 2014

3.1 Introduction

The purpose of the Protected Disclosures Act 2014 ('2014 Act') is described as being 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.'²²⁴ By providing protection to workers who make a protected disclosure, the 2014 Act is intended to act as a deterrent to employers and others from the taking of action against such workers, yet in reality, the 2014 Act is not proactive in providing protection. The 2014 Act is reactive in nature, in that it provides redress if a worker suffers retaliation for having made a protected disclosure. It does provide protection in respect of certain civil²²⁵ and criminal immunities,²²⁶ but arguably, the bringing of a claim against a worker that they have committed a civil or criminal breach could constitute retaliation in and of itself. The question arises, however, is the 2014 Act fulfilling its purpose of protecting workers who make protected disclosures? The 2014 Act has been interpreted and applied by the relevant fora for just over four years and arguably now is an appropriate time to assess the 2014 Act in action. Therefore, an analysis of the case law under the 2014 Act between 15 July 2014 and 16 July 2018 was undertaken for this purpose.

3.1(a) Objectives

The objective of the case law analysis undertaken in this chapter is to shed light on how the 2014 Act is being interpreted and applied by the relevant fora since the enactment of the 2014 Act. In addition, the case law analysis is designed to provide essential information as to use of the 2014 Act by complainants and respondents, the advantages and disadvantages

²²⁴ Protected Disclosures Act 2014.

²²⁵ *ibid* s 14. Section 14(1) provides that a person who makes a protected disclosure in compliance with the requirements of the 2014 Act is immune from civil liability. However, this immunity from civil liability excludes a cause of action in defamation. Nonetheless, s 14(2) amends the Defamation Act 2009, sch 1, pt 1 and provides that if a person who makes a protected disclosure is alleged to have committed the tort of defamation, the person may have a defence of qualified privilege in such circumstances. Therefore, a statement that constitutes a protected disclosure is one that is privileged without explanation or contradiction and will be protected in the absence of malice. Section 14 applies to a 'person' who makes a protected disclosure, however, as only a worker can make a protected disclosure under the 2014 Act, the use of this term is an anomaly.

²²⁶ *ibid* s 15. This section provides immunity from criminal liability for any offence prohibiting or restricting the disclosure of information in circumstances where a person has made a protected disclosure. This immunity also covers a disclosure that the person reasonably believes was a protected disclosure. Again, this provision applies to a 'person' as opposed to a worker. The affording of protection to a person who reasonably believes that their disclosure was a protected disclosure could potentially apply to a person who falls outside of the definition of 'worker' under the 2014 Act as long as they have a subjective belief that is objectively reasonable.

of the legislative provisions, any potential pitfalls, whether the 2014 Act is open to abuse, any patterns emerging, and ultimately, whether the 2014 Act is fit for purpose.

3.1(b) Methodology

In order to locate the Workplace Relations Commission ('WRC) and Labour Court decisions, the WRC website was accessed on various dates between 27 July 2017 and 16 July 2018.²²⁷ There were three separate search tools utilised to locate the case law. Firstly, in order to locate the unfair dismissal decisions under s 11 of the 2014 Act, the 'Legislation' search tool was used, and the 'Unfair Dismissals Acts' was selected from the drop-down menu of available legislation. In this category, fifteen cases were located out of 1819 cases decided before the WRC and Labour Court under the Unfair Dismissal Acts from 15 July 2014 until 16 July 2018.

The second search tool was the selection of the 'Protected Disclosures Act, 2014' from the drop-down menu in the 'Legislation' box. In this category, twenty-two decisions were located in the period set for the research.

Thirdly, 'Protected Disclosure' was selected from the 'Topic' dropdown menu, and ten cases were located using this method.

By using all three-search tools, forty-three cases were located. There was some overlap between the cases located using each search tool, but similarly, there were noticeable omissions between the cases located using the 'Legislation' search tool and the 'Topic' search tool as the latter only contained ten decisions relating to protected disclosures.

The decision of the Labour Relations Commission ('LRC') was located by contacting a colleague who had represented the complainant before the Labour Court as the decision was made under the old regime whereby the decisions of the LRC were not made publicly available. Another decision was not available on the WRC website, but as the Labour Court appeal had been published, the researcher was aware that such a decision existed. In order to locate the decision, the office of the solicitor who represented the respondent before the

²²⁷ Workplace Relations, 'Decisions & Determinations' (WRC) <www.workplacerelations.ie/en/Decisions_Determinations/> accessed 27 July 2017, 10 August 2017, 16 August 2017, 30 August 2017, 5 September 2017, 19 September 2017, 25 September 2017, 5 October 2017, 15 October 2017, 31 October 2017, 13 November 2017, 11 December 2017, 9 January 2018, 26 January 2018, 17 February 2018, 23 February 2018, 17 March 2018, 27 April 2018, 10 May 2018, 18 June 2018, 27 June 2018, and 16 July 2018.

Labour Court was contacted and a copy of the ‘Rights Commissioner/Adjudicator Recommendation/Decision’ was furnished via email to the researcher.

With respect to the decisions before the civil courts, the researcher was familiar with the three interim relief decisions, which came to her attention during the course of her work, including representation of the applicant in the High Court appeal of the Circuit Court decision of *Philpott v Marymount University Hospital and Hospice Ltd*.²²⁸ Searches of legal databases, bailii.org, justis, westlaw Ireland and UK, courts.ie, and lexis nexis were undertaken regularly to identify further decisions under ss 13²²⁹ and 16²³⁰ of the 2014 Act before the civil courts, but this did not yield any results.

In order to analyse the case law, there were particular issues identified to assess.²³¹ These included the following:

1. Forum
2. Sector
3. Type of claim
4. Length of service
5. Nature of disclosure: relevant wrongdoings
6. Channel of disclosure
7. Reference to protected disclosures procedures
8. Win/lose
9. Remedy and quantum
10. Subject to appeal

²²⁸ *Philpott v Marymount University Hospital and Hospice Ltd* [2015] IECC 1.

²²⁹ Protected Disclosures Act 2014, s 13 provides for an action in tort for a person who suffers a detriment because of having made a protected disclosure. This protection also extends to a person who suffers a detriment because a third person made a protected disclosure. The cause of action under s 13 lies against the person who caused the detriment.

²³⁰ *ibid* s 16 provides for the protection of identity of a person who makes a protected disclosure, subject to certain exceptions.

²³¹ For a graphical representation of the findings of the case law analysis, see: Appendices 1(a), (b), and (c) ‘Case Law Matrix’.

The research undertaken for this chapter also consisted of doctrinal research of international and national reports, articles, books, statutory rules, case law, and parliamentary debates.

3.2 Forum

3.2(a) *Introduction*

Prior to October 2015, claims could be brought before a multiplicity of different employment law fora, ie before the LRC, the Rights Commissioner Service, the Employment Appeals Tribunal ('EAT'), the Labour Court, and the Equality Tribunal. This system was deemed to be very complex, so much so that even practitioners found it difficult to access and understand.²³² It has also been described as being 'overrun with "legalism" and as a "cold and unfriendly" place for lay litigants and trade union officials.'²³³ The system was therefore dismantled and replaced with a new system whereby claims were to be initiated before the WRC,²³⁴ with a right of appeal to the Labour Court²³⁵ and a right of appeal from the Labour Court to the High Court on a point of law only.²³⁶ The new system was intended to produce key improvements to the employment law system, such as: reducing the time within which all complaints would be acknowledged from up to eight months in some cases to within five working days;²³⁷ reducing the waiting periods for adjudication hearings from up to two years to within three months of the complaint being lodged;²³⁸ replacing three separate avenues of appeal with one appeal route;²³⁹ and ensuring that all adjudication and appeal decisions would set out reasons in writing, where before no reasons were provided for some first instance adjudication decisions.²⁴⁰

Since 2014, there have been forty-eight decisions made under the 2014 Act. All forty-eight cases were assessed for the purpose of the analysis in this section. Three of these decisions were made by the Circuit Court, the EAT made one, the LRC made one, thirty-one were made by the WRC, eleven of the WRC decisions were appealed to the Labour Court and one

²³² Department of Business, Enterprise and Innovation, 'Blueprint to Deliver a World-Class Workplace Relations Service' (DBEI April 2012) 3.

²³³ Anthony Kerr, 'Changing landscapes: the juridification of the Labour Court?' 53 Irish Jurist 58, 72.

²³⁴ Workplace Relations Act 2015, s 41.

²³⁵ *ibid* s 44.

²³⁶ *ibid* s 46.

²³⁷ Department of Business, Enterprise and Innovation, 'Blueprint to Deliver a World-Class Workplace Relations Service' (DBEI April 2012) 8.

²³⁸ *ibid* 9.

²³⁹ *ibid* 8.

²⁴⁰ *ibid*.

case before the Labour Court concerned a protected disclosures claim that was not made before the WRC. Research did not locate any s 13 tort claims or s 16 breach of confidentiality²⁴¹ claims before the civil courts.

The majority of the cases under the 2014 Act were taken before the WRC. The WRC is designed with the objective that disputes can be resolved in a ‘speedy, inexpensive and relatively informal’ manner.²⁴² There are both advantages and disadvantages to utilising this forum.

3.2(b) Advantages of a WRC claim

3.2(b)(i) Costs

The advantage for a complainant making a claim under the 2014 Act before the WRC is that if they are unsuccessful, there is no award of costs against them; each party bears their own costs,²⁴³ unlike the practice before the civil courts where the general rule is that ‘costs follow the event’.²⁴⁴ This position on costs is an attractive feature of the WRC as due to the imbalance of power and resources between an employer and an employee, the threat of a costs order against an employee could act as a disincentive to initiating a claim. However, there are countervailing arguments to the non-imposition of costs orders. Barry argues that potential costs orders focuses minds and addresses the risk of parties abusing the adjudicative process.²⁴⁵ He suggests that a similar provision is introduced in Ireland to that in the UK under The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (‘2013 Regulations’).²⁴⁶ He argues that such a provision would ‘strike a correct balance to

²⁴¹ Protection of identity under s 16 of the 2014 Act is discussed in Chapter 5.

²⁴² Department of Business, Enterprise and Innovation, ‘Blueprint to Deliver a World-Class Workplace Relations Service’ (DBEI April 2012) 18. This mirrors the objective in the UK set out in the ‘Report of the Royal Commission on Trade Unions and Employers’ Associations’ (also known as the ‘Donovan Report’) where it was recommended that labour tribunals should be established to provide ‘an easily accessible, speedy, informal and inexpensive procedure’ for the settlement of employment disputes’. Lord Donovan, *Report of the Royal Commission on Trade Unions and Employers’ Associations* (Cmd 36231968) 578.

²⁴³ There are a limited range of circumstances under statute which provide for the costs or expenses to be awarded to a party to proceedings or a witness in proceedings before the WRC or the Labour Court: Employment Equality Act 1998, s 99A(1); National Minimum Wage Act 2000, ss 26(2) and 29(1); Industrial Relations Act 1946, s 21(4).

²⁴⁴ Raymond Byrne and others, *Byrne and McCutcheon on the Irish Legal System* (6th edn, Bloomsbury 2014) 241.

²⁴⁵ Brian Barry, ‘The Workplace Relations Bill 2014 - An Important Opportunity for Workplace Relations Reform’ (2014) 11(4) *Irish Employment Law Journal* 106, 111.

²⁴⁶ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 76(1) which provides that the UK Employment Tribunals (‘ET’) may make an order for costs where ‘(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

ensure that the adjudication process is not open to abuse, without the costs issue becoming a barrier to adjudication.’²⁴⁷

Nonetheless, despite the fact that under the 2013 Regulations costs should only be awarded in limited circumstances,²⁴⁸ there has been concern expressed in relation to the costs orders that have been made in Public Interest Disclosure Act 1998 (‘PIDA’)²⁴⁹ claims in the UK. Protect have reported that in 2009-11, the total amount of costs orders made against claimants and respondents was £123,000 and £12,000, respectively, and that this increased substantially in 2011-13 with £753,135 being awarded in costs against claimants and £183,992 against respondents.²⁵⁰ There is clearly a disproportionate amount of costs orders being made against claimants by ETs in PIDA claims. Protect argue that the regime of ET costs orders should be reviewed and specifically that PIDA claims should be reviewed separately to other ET cases on public interest grounds.²⁵¹ It points out that this trend of increasing costs orders in PIDA claims may undermine the objectives of the legislation, which are to protect workers from reprisal and to create a change of culture in organisations in relation to listening to concerns raised by workers, by discouraging them from pursuing

or (b) any claim or response had no reasonable prospect of success.’ Under the old employment law regime in Ireland, the Redundancy (Redundancy Appeals Tribunal) Regulations 1968, SI 1968/24, reg 19(2) gave the EAT the power to order a party to pay to another party a specified amount in respect of travelling expenses and any other costs or expenses reasonably incurred by that other party in connection with the hearing, where in the opinion of the EAT that party had acted frivolously or vexatiously. Regulation 19(3) provided further that ‘costs shall not be awarded in respect of the costs or expenses in respect of the attendance of counsel, solicitors, officials of a trade union or of an employers’ association appearing before the Tribunal in a representative capacity.’

²⁴⁷ Brian Barry, ‘The Workplace Relations Bill 2014 -An Important Opportunity for Workplace Relations Reform’ (2014) 11(4) Irish Employment Law Journal 106, 111.

²⁴⁸ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 76(2)-(5) also provide that costs can be ordered in the following circumstances: ‘(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party; (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if— (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement or adjournment of that hearing has been caused by the respondent’s failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment; (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer’s contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party; (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.’

²⁴⁹ The sections of PIDA have been incorporated into the Employment Rights Act 1996 (‘1996 Act’).

²⁵⁰ Protect, ‘Whistleblowing: Time for Change, A 5 year review by Public Concern at Work’ (Protect July 2016) 28. This is the most recent data available on this issue.

²⁵¹ Protect, ‘Is the law protecting whistleblowers? A review of PIDA claims’ (Protect 2015) 16.

claims under PIDA.²⁵² Lewis et al argue that costs are more likely to be sought and awarded in PIDA claims than in some other areas of employment law on the basis that in such claims passions are aroused, much work goes into preparing a PIDA case, and due to the ingredients in the cause of action.²⁵³ They emphasise that the power to award costs is not a compensatory power but is a disciplinary one.²⁵⁴ In the UK Employment Appeal Tribunal's ('UKEAT') decision of *HCA International Ltd v May-Bheemul*²⁵⁵ the respondent, appealing the decision of the ET not to award the costs of the ET hearing in their favour, argued that it would be 'perverse not to award costs to the successful party where there is a finding that the losing party's central allegation is untrue, or where the central allegation has not been established at trial and is held to be wrong.'²⁵⁶ The respondent argued that the claimant had failed to establish the central allegation of her case, namely that she had been subjected to detriments on the ground that she had made protected disclosures. The UKEAT disagreed, however, and upheld the decision of the ET not to make a costs order. The UKEAT stated that:

Whilst the protected disclosures relating to fraudulent activity were ultimately found not to be based on objectively reasonable grounds, they were nevertheless found and accepted to be based on genuinely held beliefs ... the objective unreasonableness of genuine belief, and a consequent failure on a Claimant's part to establish the necessary legal elements of the claim, does not equate to unreasonable conduct of the proceedings.²⁵⁷

Therefore, as long as there is a genuine held belief that the central allegation of the claimant is true, then an order of costs would not be appropriate. However, if there is no genuine belief, then it is more likely that a finding of a claim having no reasonable prospect of success is reached, thus making a cost order appropriate.²⁵⁸ It is worth noting, however, that costs orders by an ET are meant to be exceptional, as explained by Lord Justice Pill in *Lodwick v Southwark LBC*²⁵⁹ where he stated that 'Costs remain exceptional (*Gee v Shell (UK) Ltd* [2003] IRLR 82) and the aim is compensation of the party which has incurred expense in

²⁵² Protect, 'Whistleblowing: Time for Change, A 5 year review by Public Concern at Work' (Protect July 2016) 28.

²⁵³ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 11.57.

²⁵⁴ *ibid* para 11.61; *Scott v Commissioners of Inland Revenue* [2004] IRLR 713 (CA).

²⁵⁵ *HCA International Ltd v May-Bheemul* (UKEAT/0477/10, 23 March 2011).

²⁵⁶ *ibid* [32].

²⁵⁷ *ibid* [42].

²⁵⁸ *Milne v The Link Asset and Security Co Ltd* (UKEAT/0867/04, 26 September 2005); *Sharma v London Borough of Ealing* (UKEAT/0399/05, 5 January 2006).

²⁵⁹ *Lodwick v Southwark LBC* [2004] ICR 884 (CA).

winning the case, not punishment of the losing party (*Davidson v John Calder (Publishers) Ltd* [1985] ICR 143).²⁶⁰

Despite the exceptional nature of ET costs orders, the concerns raised by Protect as to the significant rise in costs orders in PIDA claims and the deterrent effect of costs on the filing of PIDA claims²⁶¹ underscores the necessity for the WRC to avoid adopting such a practice and to continue the regime that it already applies.

3.2(b)(ii) Fees

Another feature of the WRC system that encourages the initiation of claims before this forum is that there are no fees for doing so. There is a range of fees that would have to be paid for applications filed before the civil courts.²⁶² The Workplace Relations Act 2015 ('2015 Act') does provide for the possibility for WRC fees to be introduced.²⁶³ This provision has only been implemented insofar as if a complainant wishes to make an appeal to the Labour Court but fails to appear at the first instance hearing at the WRC, they will have to pay a fee of €300 when lodging their appeal.²⁶⁴ The non-imposition of fees is a welcome approach when one looks at the negative consequences of the introduction of fees in the UK. ET fees were introduced in the UK on 29 July 2013.²⁶⁵ The fees were introduced for three reasons: (i) to transfer some of the cost burden from general taxpayers to those that use the system, or cause the system to be used; (ii) to incentivise earlier settlements, and to disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims; and (iii) to bring the ET and UKEAT into line with other similar parts of the justice system.²⁶⁶ However, despite these objectives, in the year after the fees were introduced,²⁶⁷ there was a 78% reduction in

²⁶⁰ *ibid* [23].

²⁶¹ Protect, 'Is the law protecting whistleblowers? A review of PIDA claims' (Protect 2015) 16.

²⁶² District Court (Fees) Order 2014, SI 2014/22; Circuit Court (Fees) Order 2014, SI 2014/23; Supreme Court, Court of Appeal and High Court (Fees) Order 2014, SI 2014/492.

²⁶³ Workplace Relations Act 2015, s 71.

²⁶⁴ The Labour Court, 'The Labour Court User's Guide' (The Labour Court March 2017) 1.

²⁶⁵ The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893. The statutory basis for this Order derived from Tribunals, Courts and Enforcement Act 2007, s 42(1). PIDA claims were considered to be Type B claims and therefore attracted a rate of £250 for the issue fee and £950 for the hearing fee. The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893, sch 1; Remission of fees was available to certain claimants and appellants who satisfied the disposable capital test or if the Lord Chancellor was satisfied that there were exceptional circumstances justifying remission. *ibid* art 17, in accordance with sch 3 and substituted by The Courts and Tribunals Fee Remissions Order 2013, SI 2013/2302.

²⁶⁶ Department for Business, Energy and Industrial Strategy, Tribunals Service, 'Resolving Workplace Disputes: A Consultation' (BEIS January 2011) 50. These objectives were reiterated in the Ministry of Justice's consultation paper, Ministry of Justice, 'Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal' (MOJ December 2011) 11-12.

²⁶⁷ 2013/14 Q3 to 2014/15 Q2.

the number of claims accepted by ETs compared to the year before their introduction and in the second year,²⁶⁸ there was a reduction of 62%.²⁶⁹ When looking at PIDA claims, in particular, there were 2,744 claims made under PIDA that were received and accepted by the ET during 2012-13, with a fall of almost 20% with 2,212 PIDA claims being received and accepted by the ET in the year after the fees were introduced.²⁷⁰ The UK Ministry of Justice's review report of the introduction of fees in ETs determined that this reduction in cases was due to the introduction of fees and stated:

104. Our analysis of the counterfactual trend in ET receipts (i.e. the number of claims that we would have expected to have received in the ETs had fees not been introduced) concluded that the volume of single claims would have fallen by around eight percent by June 2014 as a result of the improving economy ...

105. The actual fall since fees were introduced has been much greater and we have therefore concluded that it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees.²⁷¹

This finding is reflected in the UK Advisory, Conciliation and Arbitration Service ('Acas') surveys undertaken in 2015 and 2016, which inter alia looked at the reasons for non-submission/withdrawals of ET claims by claimants. In the 2015 survey, the participants were claimants (and their representatives) who had already engaged with the tribunal system via an Acas Early Conciliation Notification but who had not submitted an ET claim and did not have an intention to do so, nor were their claims resolved using a COT3 settlement.²⁷² Twenty-six per cent of participants indicated that the reason why they did not submit an ET claim was that tribunal fees were off-putting.²⁷³ This was the single most frequent reason given. Participants who responded that the tribunal fees were off-putting were further asked why this was the case. The majority of participants stated that 'I could not afford the fee' (68%).²⁷⁴ This was followed by 'The fee was more than I was prepared to pay' (19%); 'The value of the fee equalled the money I was owed' (9%); and 'I disagree with the principle of having to pay the fee to lodge the claim' (6%).²⁷⁵ In their 2016 survey, the issue of tribunal

²⁶⁸ 2014/15 Q3 to 2015/16 Q2.

²⁶⁹ Ministry of Justice, 'Review of the introduction of fees in the Employment Tribunals Consultation on proposals for reform' (MOJ January 2017) Annex E: Employment Tribunals and Employment Appeal Tribunal caseload.

²⁷⁰ Protect, 'Is the law protecting whistleblowers? A review of PIDA claims' (Protect 2015) 17.

²⁷¹ Ministry of Justice, 'Review of the introduction of fees in the Employment Tribunals Consultation on proposals for reform' (MOJ January 2017) paras 104-105.

²⁷² Acas, 'Evaluation of Acas Early Conciliation 2015' (ACAS 2015) 96.

²⁷³ *ibid* 97.

²⁷⁴ *ibid* 98.

²⁷⁵ *ibid*.

fees was the second most common reason for withdrawal of an ET case, with 20% of the participants indicating that the reason why they withdrew their ET case was that they felt that tribunal fees were off-putting.²⁷⁶

Therefore, although the objectives of introducing ET fees were well-intentioned and legitimate, as acknowledged by the Supreme Court,²⁷⁷ the significant reduction in complaints before the ET meant that the impact of the introduction of the fees went far greater than anticipated and undoubtedly acted as a deterrent to individuals to file genuine claims. The Supreme Court ultimately found that ET fees were unlawful as they restricted a potential claimant's right of access to justice. The Supreme Court stated that:

In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission. The evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met. In the first place, as the Review Report concludes, "it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees".

While the Review Report fairly states that there is no conclusive evidence that the fees have prevented people from bringing claims, the court does not require conclusive evidence: as the Hillingdon case indicates, it is sufficient in this context if a real risk is demonstrated. The fall in the number of claims has in any event been so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.²⁷⁸

ET fees were abolished on 26 July 2017, and a fee refund scheme was introduced in October 2017. Since its introduction, there have been 9,742 applications for refunds of fees received and as of 31 March 2018, 7,733 payments have been made, which totals £6,555,595.²⁷⁹ The experience in the UK of imposing ET fees underscores the necessity to preserve the status quo in Ireland where WRC and Labour Court fees have not been implemented, bar the single situation of when a complainant makes an appeal to the Labour Court but who failed to appear at the WRC hearing.

3.2(b)(iii) *Processing times*

²⁷⁶ Acas, 'Evaluation of Acas conciliation in Employment Tribunal applications 2016' (ACAS 2016) 67. The most common reason given by participants (25%) was that they thought that the employer would win/thought it would be a waste of time.

²⁷⁷ *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] ICR 1037 (SC) [86].

²⁷⁸ *ibid* [91].

²⁷⁹ Ministry Of Justice, 'Tribunals and Gender Recognition Statistics Quarterly, January to March 2018 (Provisional)' (MOJ 14 June 2018) 7.

Another advantage of a WRC claim is that the time frame within which a claim is generally processed is relatively short. The WRC reports that 92% of adjudication complaints are processed in less than six months where submissions are received in a timely manner, and no requests for postponements are received and granted.²⁸⁰ On analysis of twenty-eight cases²⁸¹ before the WRC under the 2014 Act, the average time from receipt to hearing was six months and from hearing to the issuing of a decision was four months. Therefore, the average time taken to process the claim was ten months. This data does not take into account any postponements²⁸² as these details are not readily available from all the written decisions and therefore cannot be taken into consideration, and as such, the data cannot adequately represent the time it takes to process a claim before the WRC under the 2014 Act. Nonetheless, taking both sets of data, from the WRC report and the researcher's own analysis into consideration from a complainant's perspective, the time for a claim to be processed before the WRC is significantly shorter than the average length of time it takes for a claim to be processed before the civil courts, where the average length of proceedings in 2017 was 753 days in the High Court and 534 days in the Circuit Court.²⁸³

3.2(b)(iv) *Alternative dispute resolution*

If a complaint filed with the WRC is deemed capable of resolution by mediation by the WRC Director General, the complaint may be referred to a mediation officer.²⁸⁴ In 2017, the WRC

²⁸⁰ Workplace Relations Commission, 'Workplace Relations Commission Annual Report 2017' (WRC 2017) 4 and 7.

²⁸¹ Twenty-eight cases were used in this analysis, rather than the thirty-one cases that were determined by the WRC because one case did not set out the receipt, hearing, and decision dates, as the case was determined during the transition from the LRC to the WRC (*Carr v Donegal CC* r-153749-pd-14) and three cases were joint cases and were therefore treated as one case for the purposes of calculating the processing times (*Mr A v A Public Body* ADJ-00006360, *Mr A(1) v A Government Department* ADJ-00006381, *Mr A(2) v A Government Department* ADJ-00009800).

²⁸² A postponement of the hearing will be given in exceptional circumstances and only for substantial reasons. Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (WRC October 2015) 6.

²⁸³ Courts Service of Ireland, 'Annual Report 2017' (Courts Service of Ireland 2017) 94.

²⁸⁴ Workplace Relations Act 2015, s 39(1)(a). *ibid* s 39(1)(b) provides that if the WRC Director General does not believe that mediation is a viable option for resolution of the complaint, or if either party objects to a referral to mediation, then the WRC Director General must refer the complaint for adjudication by an Adjudication Officer. The Mediation Act 2017 came into force on 1 January 2018. Mediation Act 2017, ss 14(1)-(3) oblige solicitors, prior to issuing proceedings in civil claims to '(a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings, (b) provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services, (c) provide the client with information about— (i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and (ii) the benefits of mediation, (d) advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and/or their children is at risk' and inform the client that the solicitor is obliged to provide a statutory declaration with the originating document by which proceedings are instituted that the client has been advised of the above and the effect of the non-provision of a statutory declaration. This obligation excludes

facilitated 197 face-to-face mediations and 376 telephone mediations.²⁸⁵ When these numbers are combined, these mediations achieved a 46% settlement rate,²⁸⁶ which resulted in 220 complaints being triaged away from the Adjudication Service.²⁸⁷

These findings can be contrasted with the UK ‘Early Conciliation’ (‘EC’) service introduced in April 2014, which became mandatory in May 2014, and requires that those intending to lodge an ET claim to contact Acas in the first instance to see if the matter can be resolved without having to resort to adjudication.²⁸⁸ Prior to the service being made mandatory, there were 22,630 conciliation notifications to Acas in 2012/13.²⁸⁹ The number of conciliations grew exponentially once it was made mandatory, with 83,423 conciliation notifications being made in 2014/15,²⁹⁰ 92,127 in 2015/16,²⁹¹ 92,251 in 2016/17²⁹² and 109,364 in 2017/18.²⁹³ Of those who participate in EC, the numbers who reach COT3 settlements are relatively low, at 15% in the six months after the process was made mandatory,²⁹⁴ 17% in 2015/16,²⁹⁵ 18% in 2016/17,²⁹⁶ and 15% in 2017/18.²⁹⁷ Nonetheless, those that did not submit an ET claim having participated in EC were quite high at 63% in the first six months

proceedings/applications under ‘(a) section 6A, 11 or 11B of the Guardianship of Infants Act 1964 , (b) section 2 of the Judicial Separation and Family Law Reform Act 1989 , or (c) section 5 of the Family Law (Divorce) Act 1996’. *ibid* s 14(4).

²⁸⁵ Workplace Relations Commission, ‘Workplace Relations Commission Annual Report 2017’ (WRC 2017) 18.

²⁸⁶ *ibid*.

²⁸⁷ *ibid* 19.

²⁸⁸ Employment Tribunals Act 1996, s 18A, as inserted by Enterprise and Regulatory Reform Act 2013, s 7.

²⁸⁹ Ministry of Justice, ‘Review of the introduction of fees in the Employment Tribunals Consultation on proposals for reform’ (MOJ January 2017) paras 104-105, Annex F: Information on Acas’s early conciliation service.

²⁹⁰ Acas, ‘Conciliation Update: April 2014 - March 2015’ (ACAS, 7 July 2015) <www.acas.org.uk/index.aspx?articleid=5352> accessed 13 September 2018.

²⁹¹ Acas, ‘Conciliation Update: April 2015 - March 2016’ (ACAS, 23 May 2016) <www.acas.org.uk/index.aspx?articleid=5741> accessed 13 September 2018.

²⁹² Acas, ‘Conciliation Update: April 2016 - March 2017’ (ACAS, 14 June 2017) <www.acas.org.uk/index.aspx?articleid=6018> accessed 13 September 2018.

²⁹³ Acas, ‘Conciliation Update: April 2017 - March 2018’ (ACAS) <www.acas.org.uk/index.aspx?articleid=6564> accessed 13 September 2018.

²⁹⁴ Acas, ‘Conciliation Update: April 2014 - March 2015’ (ACAS, 7 July 2015) <www.acas.org.uk/index.aspx?articleid=5352> accessed 13 September 2018.

²⁹⁵ Acas, ‘Conciliation Update: April 2015 - March 2016’ (ACAS, 23 May 2016) <www.acas.org.uk/index.aspx?articleid=5741> accessed 13 September 2018.

²⁹⁶ Acas, ‘Conciliation Update: April 2016 - March 2017’ (ACAS, 14 June 2017) <www.acas.org.uk/index.aspx?articleid=6018> accessed 13 September 2018.

²⁹⁷ Acas, ‘Conciliation Update: April 2017 - March 2018’ (ACAS) <www.acas.org.uk/index.aspx?articleid=6564> accessed 13 September 2018.

after the process was made mandatory,²⁹⁸ 65% in 2015/16,²⁹⁹ 64% in 2016/17,³⁰⁰ and 58% in 2017/18.³⁰¹ According to the Acas survey results in 2015, 61% of survey participants reported that Acas was a factor (to varying extents)³⁰² in helping them to reach their decision not to submit an ET claim.³⁰³ However, in 2016, there was a drastic reversal of these results, where 81% of claimants (and their representatives) who were asked to what extent Acas was a factor in them deciding to withdraw their ET claim, stated that Acas conciliation did not play a role in their decision, with 17% indicating that it was a factor (to varying extents)³⁰⁴ in helping them to reach that conclusion.³⁰⁵

The workplace dispute mediation service provided in Ireland by the WRC may be an attractive option for a complainant as it could result in an inexpensive and speedy resolution of their dispute in a voluntary mutually agreeable manner, which avoids the adversarial process of a hearing before the WRC. A further attraction of mediation is that an agreement could be made that the employer would investigate and remedy the wrongdoing disclosed by the worker. As Lewis points out ‘Many whistleblowers are ethically driven and are determined to get an investigation of their concerns and ensure that any proven wrongdoing is rectified. These outcomes are unlikely to be achievable via tribunal adjudication but might form the basis of an amicable settlement.’³⁰⁶ Nonetheless, it has been recognised that mediation of complaints in this area can be complex and challenging due to heightened emotions on the part of the complainant, which can result in such mediations taking longer than those in other areas of employment law.³⁰⁷ Further, agreements reached via mediation must also be careful not to breach s 23 of the 2014 Act, which provides that any provision

²⁹⁸ Acas, ‘Conciliation Update: April 2014 - March 2015’ (ACAS, 7 July 2015) <www.acas.org.uk/index.aspx?articleid=5352> accessed 13 September 2018.

²⁹⁹ Acas, ‘Conciliation Update: April 2015 - March 2016’ (ACAS, 23 May 2016) <www.acas.org.uk/index.aspx?articleid=5741> accessed 13 September 2018.

³⁰⁰ Acas, ‘Conciliation Update: April 2016 - March 2017’ (ACAS, 14 June 2017) <www.acas.org.uk/index.aspx?articleid=6018> accessed 13 September 2018.

³⁰¹ Acas, ‘Conciliation Update: April 2017 - March 2018’ (ACAS) <www.acas.org.uk/index.aspx?articleid=6564> accessed 13 September 2018.

³⁰² Eighteen per cent of survey participants indicated that their decision not to submit an ET claim was ‘completely’ due to Acas, whilst 19% said that it was ‘to a large extent’ and 24% said it was ‘to some extent’. Acas, ‘Evaluation of Acas Early Conciliation 2015’ (ACAS 2015) 98.

³⁰³ *ibid.*

³⁰⁴ Seven per cent indicated that Acas had helped them in their decision to withdraw their ET claim ‘to a large extent’, whilst 10% said that Acas had ‘to some extent’ been a factor. Acas, ‘Evaluation of Acas conciliation in Employment Tribunal applications 2016’ (ACAS 2016) 67.

³⁰⁵ *ibid.*

³⁰⁶ David Lewis, ‘Resolving Whistleblowing Disputes in the Public Interest: Is Tribunal Adjudication the Best that Can be Offered?’ (2013) 42(1) *Industrial Law Journal* 35, 37.

³⁰⁷ Richard D Fincher, ‘Mediating whistleblower disputes: integrating the emotional and legal challenges’ (2009) 64(1) *Dispute Resolution Journal* 62, 67 and 69.

in an agreement that intends to prohibit or restrict the making of a protected disclosure or exclude or limit the operation of any provision of the 2014 Act is void.³⁰⁸ Further, s 23 voids any provision in an agreement that precludes a person from bringing any proceedings under or by virtue of the 2014 Act or precludes a person from bringing proceedings for breach of contract in respect of anything done in consequence of the making of a protected disclosure.³⁰⁹ It will be difficult to police such mediation agreements, and therefore the WRC mediation officer must be familiar with the rules relating to such agreements under the 2014 Act to ensure that the worker's rights are respected in that regard.

3.2(b)(v) *Proceedings conducted in private*

The advantage of a WRC decision from the perspective of a complainant who wishes to maintain confidentiality is that the proceedings are conducted in private³¹⁰ and the parties to proceedings under the 2014 Act are anonymised in the written decisions.³¹¹ This anonymity may also be seen as being advantageous from an employer's perspective as it may protect the employer from any adverse publicity that could arise from proceedings under the 2014 Act. Nonetheless, if the case is appealed to the Labour Court, the proceedings are held in public (unless there are special circumstances requiring otherwise)³¹² and the parties will be identified when the case is published on the workplace relations website upon final determination of the matter.

3.2(c) *Disadvantages of a WRC claim*

3.2(c)(i) *Filing times*³¹³

The disadvantage for a complainant of filing their claim before the WRC is the short time frame within which the claim must be filed. Complaints must initially be presented in writing³¹⁴ to the Director General of the WRC within six months of the date of the alleged contravention.³¹⁵ The date on which a complaint or dispute is referred is the date it is received by the WRC.³¹⁶ If a complaint is not received within the six-month time frame, an extension

³⁰⁸ Protected Disclosures Act 2014, s 23(a) and (b).

³⁰⁹ *ibid* s 23(c) and (d).

³¹⁰ Workplace Relations Act 2015, s 41(13).

³¹¹ *ibid* s 41(14).

³¹² *ibid* s 44(7).

³¹³ The issue of 'filing times' is discussed in detail in the 'Type of claim' section.

³¹⁴ Workplace Relations Act 2015, s 41(9)(a).

³¹⁵ *ibid* s 41(6).

³¹⁶ Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (WRC October 2015) 3.

may be granted by an Adjudication Officer up to a maximum time limit of twelve months where, in the opinion of the Adjudication Officer, the complainant has demonstrated reasonable cause for the delay.³¹⁷ For civil claims initiated under s 13 of the 2014 Act, a six-year limitation period applies.³¹⁸ This six-year limitation period is a much more extensive time frame and an attractive one for potential complainants. The fact that 24% of claims under the 2014 Act before the WRC and the Labour Court failed because they were not submitted before the WRC within the six-month period highlights the potential benefit of bringing a tort action before the civil courts under s 13 of the 2014 Act.³¹⁹

3.2(c)(ii) *Compensation*³²⁰

Another disadvantage of bringing a claim before the WRC is the cap on compensation that can be awarded to a successful complainant.³²¹ There is no provision for an award of damages to be capped in a claim before the civil courts under s 13 of the 2014 Act and the only limitation on the amount that can be awarded is the monetary jurisdiction of the particular court in which the claim is brought.³²² A further disadvantage to a claim before the WRC compared to a claim before the civil courts is the potential that compensation awarded by the WRC can be reduced by up to 25% if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.³²³ There is no similar provision in relation to a s 13 tort claim before the civil courts under the 2014 Act.

3.3 Sector

3.3(a) *Introduction*

The 2014 Act was the first pan-sectoral whistleblowing legislation enacted in Ireland. It applies to workers in the public, private, and non-profit sectors. From the information

³¹⁷ Workplace Relations Act 2015, s 41(8).

³¹⁸ Statute of Limitations 1957, s 11(2)(a).

³¹⁹ This is discussed further in the 'Type of claim' section.

³²⁰ The issue of 'compensation' is discussed in detail in the 'Remedy and quantum' section.

³²¹ Protected Disclosures Act 2014, s 11(1)(d); *ibid* sch 2, s 1(3)(c).

³²² The general monetary jurisdiction of the District Court is €15,000, Courts of Justice Act 1924, s 77(a)(i), (iii) and (v) carried forward by the Courts (Supplemental Provisions) Act 1961, s 33, and amended from time to time, most recently by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the Circuit Court is €75,000 or €60,000 for personal injury actions, Courts (Supplemental Provisions) Act 1961, Third Schedule, as amended by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the High Court is for claims of damages in excess of €75,000, or for personal injuries actions in excess of €60,000, there is no ceiling on the amount of damages that can be awarded.

³²³ Protected Disclosures Act 2014, sch 2, s 1(4).

available from the case law,³²⁴ 54% (nineteen) of the claims under the 2014 Act arose in the private sector, 26% (nine) in the public sector,³²⁵ 9% (three) in the non-profit sector, and in 11% (four) of the cases, there was no information as to which sector the claim arose.

3.3(b) Protected disclosures procedures

As can be seen from the data above, based on the case law analysis of thirty-five cases, the majority of the claims arose in the private sector. This data is similar to the findings in the UK, where 66% of PIDA claims in 2011-13 were in the private sector, whilst just like in Ireland, 26% (nine) of the claims in 2011-13 arose in the public sector.³²⁶

Looking only at the rates of claims from the public and private sectors in Ireland, 32% (nine) of the claims arose in the public sector and 68% (nineteen) arose in the private sector. According to the Central Statistics Office, between 2014 Q1 and 2018 Q2, there were on average, 384,278 people working in the public sector (including semi-state bodies) and 1,298,750 people working in the private sector.³²⁷ This equates to 23% of people in Ireland working in the public sector and 77% of people working in the private sector (leaving aside the non-profit sector).

On first glance, it would appear that the lower rate of cases emanating from the public sector in Ireland could simply be due to the fact that the majority of workers are working in the private sector, rather than in the public sector. However, if all other things were equal, it

³²⁴ Thirty-five cases were assessed for the purpose of determining the sector within which the complainant worked as eleven cases were appealed and three cases were the connected cases of 'Mr A' and therefore had the same complainant.

³²⁵ Protected Disclosures Act 2014, s 3(1) defines a 'public body' as '(a) a Department of State, (b) a local authority within the meaning of the Local Government Act 2001, (c) any other entity established by or under any enactment (other than the Companies Acts), statutory instrument or charter or any scheme administered by a Minister of the Government, (d) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government, (e) a subsidiary (within the meaning of the Companies Acts) of such a company, (f) an entity established or appointed by the Government or a Minister of the Government, (g) any entity (other than one within *paragraph (e)*) that is directly or indirectly controlled by an entity within any of *paragraphs (b) to (f)*, (h) an entity on which any functions are conferred by or under any enactment (other than the Companies Acts), statutory instrument or charter, or (i) an institution of higher education (within the meaning of the Higher Education Authority Act 1971) in receipt of public funding'.

³²⁶ Protect, 'Whistleblowing: Time for Change, A 5 year review by Public Concern at Work' (Protect July 2016) 29. Four per cent of the cases were in the voluntary sector and in 3% of the cases, the sector was unknown. In 2009-10, 68% of the cases were in the private sector, whilst again 26% of the claims were in the public sector and 4% were in the voluntary sector. In 3% of the cases, the sector was unknown. This is the most recent data available on this issue.

³²⁷ Central Statistics Office, 'EHQ08: Average Earnings, Hours Worked, Employment and Labour Costs by Private or Public Sector, Quarter and Statistic' (*Central Statistics Office*) <www.cso.ie/px/pxeirestat/Statire/SelectVarVal/Define.asp?maintable=EHQ08> accessed 12 October 2018.

would be expected that the rate of claims from the public and private sector would be in exactly the same proportion as the number of people working in these sectors. Hence, since the proportion of workers in the sectors is 23% in the public sector and 77% in the private sector, it would be expected that the proportion of claims would be 23% in the public sector and 77% in the private sector. This is not the case, however, and as already stated, 32% of the claims arose in the public sector and 68% arose in the private sector. Therefore, this indicates that the public sector is overrepresented in claims under the 2014 Act.

It would have been expected that the requirement on public bodies under the 2014 Act to establish and maintain protected disclosures procedures ('Procedures')³²⁸ would mean that disclosures are being handled more appropriately than in the private sector, including providing protection to workers who raise concerns. It is estimated that 94% of public bodies have complied with this legal obligation.³²⁹ However, according to the findings of Transparency International Ireland's ('TII') Integrity at Work ('IAW') survey, 34% of private/not-for-profit sector employers had introduced a system to promote whistleblowing in the workplace, and only 10% of employers indicated that they had a whistleblowing policy or guidance.³³⁰ Nonetheless, the evidence that the public sector is overrepresented in claims under the 2014 Act means that the imposition of a legal obligation to establish and maintain Procedures alone is not sufficient to ensure the protection of workers who make protected disclosures. This data underpins the necessity for training in the area of protected disclosures (discussed at section 3.3(c)) so that workers making such disclosures are afforded appropriate protection.

The draft EU Commission Directive on whistleblowing proposes that member states must ensure that public and private sector legal entities³³¹ establish internal channels and

³²⁸ Protected Disclosures Act 2014, s 21(1).

³²⁹ Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 33.

³³⁰ *ibid* 42.

³³¹ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 4(3) and (4) provides that legal entities in the private sector include 'a) private legal entities with 50 or more employees; b) private legal entities with an annual business turnover or annual balance sheet total of EUR 10 million or more; c) private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing, as regulated under the Union acts referred to in the Annex. 4. Following an appropriate risk assessment taking into account the nature of activities of the entities and the ensuing level of risk, Member States may require small private legal entities, as defined in Commission Recommendation of 6 May 2003⁶², other than those referred to in paragraph 3(c) to establish internal reporting channels and procedures' Legal entities in the public sector include 'a) state administration; b) regional administration and departments; c) municipalities with more than 10 000 inhabitants; d) other entities governed by public law.' *ibid* art 4(6).

Procedures both for reporting and for following up on reports.³³² It remains to be seen whether the imposition of an obligation on certain legal entities in the private sector to establish and maintain Procedures will reduce the number of cases originating from the private sector and this is something that should be assessed when the draft EU Commission Directive on whistleblowing is adopted and transposed into national law.

3.3(c) Training

There is evidence of limited protected disclosures training in the public sector. For example, on 22 September 2016, TII launched its IAW initiative,³³³ which is designed to promote supportive workplace environments for anyone who makes disclosures of wrongdoing; this is achieved through training, best practice exchange, online resources, and specialist advice and guidance. The IAW programme is partly funded by the Department of Public Expenditure and Reform ('DPER'). The IAW training has been provided to a small number of public sector organisations,³³⁴ totalling 480 participants.

Further, DPER published a 'Request for Tenders to Establish a Multi-Supplier Framework for the Provision of Training Services under Protected Disclosures Act 2014' in May 2017. The successful framework members, RSM Ireland and Byrne Wallace Solicitors³³⁵ are required to provide two types of training. The first training consists of a general overview for public sector employees of the 2014 Act, which is designed to develop both general knowledge and awareness of the 2014 Act, whilst the second training is advanced training for staff who are tasked with developing internal Procedures or who are designated as confidential recipients. The training also extended to staff who were required to follow up on any allegations made in a protected disclosure.³³⁶ The framework agreement is twenty-four months in length with the possibility of two twelve-month renewals and is therefore

³³² *ibid* art 4(1).

³³³ For more information on Transparency International Ireland's Integrity at Work initiative, see: Transparency International Ireland, 'About Integrity at Work' (*TII*) <www.transparency.ie/integrity-work> accessed 10 October 2018.

³³⁴ Department of Justice; National Disability Authority; Policing Authority; Irish Congress of Trade Unions; Action Aid, Valuation Office; Legal Aid Board; the Charities Regulator; Courts Service; Probation Service; Garda Síochána; Higher Education Authority; Insolvency Service of Ireland; International Protection Office; Irish Film Classifications Office; Irish Prison Service; Road Safety Authority; and Property Registration Authority of Ireland.

³³⁵ ETenders, 'Contract award notice' (*Etenders*, 7 September 2017) <<https://irl.eu-supply.com/ctm/Supplier/PublicTenders/ViewNotice/195643>> accessed 30 July 2018.

³³⁶ Department of Public Expenditure and Reform, 'Government Reform Agenda Protected Disclosures Act 2014' (DPER).

ongoing.³³⁷ At the time of writing, in responding to a request by the researcher, RSM indicated that it had not provided any trainings, whilst Byrne Wallace responded that the training had been provided to the Department of Defence and the Department of Housing, Planning and Local Government.

The publication of a tender for protected disclosures training in the public sector is welcome. However, it is arguable that this should have been made available at the time that the 2014 Act was enacted, and not some three years' post-date, when public bodies were potentially receiving protected disclosures but not managing them correctly and affording disclosers appropriate protection. The public sector needs to engage with the opportunities available to receive training in this area. Otherwise, the compliance by public bodies with their obligations under s 21 of the 2014 Act is merely a tick the box exercise with no commitment demonstrated to dealing appropriately with both disclosures and the discloser. In time, it would be worth analysing both the annual reports of those organisations who received protected disclosures training and the case law, to assess whether the organisation's environment promotes and encourages the making of disclosures; the steps taken to address the wrongdoing; and whether the worker needed to bring a claim for redress under the 2014 Act.

3.4 Type of claim

3.4(a) *Introduction*

Workers are protected under the 2014 Act from acts of penalisation and detriment for having made a protected disclosure. Depending on the nature of the employment relationship, different forms of protection apply. Employees are protected from penalisation and detriment whilst workers other than employees are only protected from detriment. Protection against detriment is also extended to third parties under s 13 of the 2014 Act.

Thirty-seven of the forty-eight cases were assessed to determine the type of claim brought under the 2014 Act, as eleven WRC cases were appealed to the Labour Court and were the same claim. The majority of the claims under the 2014 Act were penalisation claims, with 48% (eighteen) of the claims being brought under s 12. Forty-one per cent (fifteen) of the claims were unfair dismissal claims under s 11, whilst 8% (three) of the claims were interim

³³⁷ Etenders, 'Contract notice' (*Etenders*, 16 May 2017) <<https://irl.eu-supply.com/ctm/Supplier/PublicTenders/ViewNotice/191634>> accessed 30 July 2018.

relief claims. Three per cent (one) of the claims were both penalisation and unfair dismissal claims; however, as can be seen below, s 12(2) of the 2014 Act prohibits claims for unfair dismissal under s 11 and for penalisation under s 12, so the initiation and hearing of both claims simultaneously is erroneous. None of the cases identified under the 2014 Act concerned a claim under s 13, and therefore this section is not subject to an assessment herein.

There is a wide definition of ‘penalisation’ under the legislation. An employer is prohibited from carrying out any act or omission that affects a worker to the worker’s detriment and this includes: (i) suspension, lay-off or dismissal; (ii) demotion or loss of opportunity for promotion; (iii) transfer of duties, change of location or place of work, reduction in wages or change in working hours; (iv) the imposition or administering of any discipline, reprimand or other penalty (including financial penalty); (v) unfair treatment; (vi) coercion, intimidation or harassment; (vii) discrimination, disadvantage or unfair treatment; (viii) injury, damage or loss; and (ix) threat of reprisal.³³⁸ The definition of penalisation in the 2014 Act arguably gives an open-ended list of various forms of treatment which may constitute penalisation as the definition of penalisation in the 2014 Act uses the phrase ‘in particular includes’³³⁹ and on that basis additional matters could also be claimed as penalisation.

Protection from penalisation is separated into two forms of protection under the 2014 Act. The first is protection under s 11 from unfair dismissal and the second is protection under s 12 from all other acts or omissions that are defined as penalisation under s 3(1) of the 2014 Act.

3.4(b) *Unfair Dismissal*

Section 11(1) of the 2014 Act amends the Unfair Dismissals Act 1977 (‘1977 Act’) to provide that the dismissal of an employee is automatically unfair if it results wholly or

³³⁸ Protected Disclosures Act 2014, s 3(1).

³³⁹ *Ryan v A-G* [1965] IR 294 (SC) 313 where Mr Justice Kenny conducted a literal/grammatical analysis of Article 40.3.1° and 2° of the Constitution and held that Article 40.3 contained a guarantee to protect an unspecified number of personal rights. Article 40.3.2° provides that ‘The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’. Mr Justice Kenny stated that ‘The words "in particular" show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the general guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1 must extend to rights not specified in Article 40.’

mainly from an employee having made a protected disclosure.³⁴⁰ This protection only applies to employees.³⁴¹ Employees are protected from the first day of their employment.³⁴²

There appears to be inconsistency in the case law as to the approach taken with respect to determining whether there was an unfair/constructive dismissal under the 2014 Act. In six cases,³⁴³ the approach taken by the WRC was first to determine whether there was an unfair/constructive dismissal and then to assess whether the dismissal was wholly or mainly as a result of the employee having made a protected disclosure. This approach was explained in *A Childcare Worker v A Creche*³⁴⁴ where the Adjudication Officer stated that:

The pertinent questions to be addressed in the instant case are whether a dismissal within the meaning of the act has occurred or not in the first instance and if so whether in all the circumstances that dismissal arose as a direct result of the complainant having made a protected disclosure within the meaning of the Protected Disclosure Act, 2014.

In the six cases mentioned, the Adjudication Officer made no assessment of whether a protected disclosure was made, even in the two successful cases. There did not appear to be any mechanical process in the deliberations of the Adjudication Officers in those decisions.

A better approach would be first for the WRC to satisfy itself that the complainant established that there was a dismissal as defined under s 1 of the Unfair Dismissals Act 1977. If the Adjudication Officer is satisfied that a dismissal has occurred, it should then assess whether the respondent rebutted the presumption in s 5(8) of the 2014 Act that the alleged disclosure is a protected disclosure. At that stage, if the presumption in s 5(8) is not rebutted, the Adjudication Officer should then assess whether the employer either: (i) proved that the dismissal was fair; or (ii) that it failed to prove that the dismissal was not wholly or mainly

³⁴⁰ Unfair Dismissals Act 1977, s 6(ba), as inserted by Protected Disclosures Act 2014, s 11(1)(b).

³⁴¹ The definition of 'employee' under the 2014 Act extends to members of the Garda Síochána and to civil servants (within the meaning of the Civil Service Regulation Act 1956). Further, the Unfair Dismissals (Amendment) Act 1993, s 13, provides that agency staff are deemed to be employees for the purposes of claiming unfair dismissal under the Unfair Dismissals Act 1977.

³⁴² Protected Disclosures Act 2014, s 11(1)(c).

³⁴³ *A Worker v A Nursing Home* ADJ-00000267; *An Employee v An Employer* ADJ-00000258; *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD 981/2015; *Mr A(2) v A Government Department* ADJ-00009800; *A Childcare Worker v A Creche* ADJ-00002421; *Researcher v Employment Agency* ADJ-00010550.

³⁴⁴ *A Childcare Worker v A Creche* ADJ-00002421.

because the employee made a protected disclosure.³⁴⁵ This was the approach taken by the WRC/Labour Court in eight cases.³⁴⁶

An example of this approach can be seen in the first successful unfair dismissal claim under the 2014 Act, *An Employee v A Nursing Home*³⁴⁷ where the complainant, a staff nurse, claimed that she was dismissed for having made a number of protected disclosures relating to the health and safety of the residents of the respondent's nursing home. At the time of the dismissal, the complainant did not have twelve months' service and therefore the Adjudication Officer was required to consider whether her dismissal was linked to her making a protected disclosure in line with the 2014 Act to the Health Information and Quality Authority ('HIQA'). The Adjudication Officer did not state that she accepted that there was a dismissal, but it is presumed she accepted this as she then proceeded to address the subsequent issues on foot of their being a dismissal. The Adjudication Officer first confirmed that a protected disclosure was made as per the definition in the legislation. She then proceeded to investigate the link between that disclosure and the dismissal. She found that the respondent had not established that any of the actions taken against the complainant were not connected with the protected disclosure and also that the respondent had commenced and instigated the disciplinary procedure in an attempt to dismiss the complainant in advance of her reaching twelve months' service. She, therefore, concluded that the dismissal of the complainant was an unfair dismissal, as the complainant would not have been subjected to disciplinary proceedings, including dismissal, if it had not been for the protected disclosures made by the complainant. She also concluded that the respondent had not followed the rules of natural justice. She held that these actions were clearly linked to the protected disclosures made by the complainant to HIQA and awarded the complainant two years' compensation, discussed below in the 'Remedy and quantum' section. The approach adopted by the Adjudication Officer herein in her deliberations is a sounder

³⁴⁵ In the UK decision of *Kuzel v Roche Products Ltd* [2008] ICR 799, the Court of Appeal emphasised that if the tribunal is not satisfied that the reason for the dismissal was that which was asserted by the employer then it is open to the tribunal to find that the reason for the dismissal was what the employee had asserted. However, the Court of Appeal clarified further that just because the tribunal does not accept the reason for the dismissal proffered by the employer that it must find that the employee was dismissed for the reason asserted by the employee. The Court of Appeal stated, 'It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.' *ibid* [60].

³⁴⁶ *An Employee v A Nursing Home* ADJ-00000456; *A Worker v A Communications Provider* ADJ-00001380; *A Service Engineer v A Provider of Plant Machinery* ADJ-00007236; *A Worker v A Service Station* ADJ-00006640; *A Senior Account Manager v A Print Management and Logistics Company* ADJ-00005984; *An Office Administrator v A Removals and Storage Company* ADJ-00008404; *An Employee v An Agency* ADJ-00008429; *Southside Travellers Action Group v O'Keefe* UDD 1828.

³⁴⁷ *An Employee v A Nursing Home* ADJ-00000456.

approach than the alternate one adopted in the aforementioned cases.

It is fundamental that it is determined whether a protected disclosure has been made as if this is not undertaken then the reason for the dismissal cannot be assessed properly, especially taking into consideration the presumption in s 5(8) that a disclosure is a protected disclosure. Thus, in *A Service Engineer v A Provider of Plant Machinery*³⁴⁸ the Adjudication Officer found that the respondent had rebutted the presumption in s 5(8) of the 2014 Act as the complainant's disclosures related to payment of overtime and hours worked by him and these were held to be matters that related squarely to his contract of employment. Therefore, the complainant's disclosure did not constitute a protected disclosure for the purpose of the 2014 Act, and as he had less than twelve months' service, he could not rely on the unfair dismissals legislation to advance his complaint.

3.4(c) *Interim relief*

Section 11(2) of the 2014 Act provides that employees who bring a claim for redress for a dismissal which is an unfair dismissal by virtue of s 6(2)(ba) of the 1977 Act may also make an application for interim relief under sch 1 of the 2014 Act.³⁴⁹ This is the first time that interim relief has been introduced into an employment law statute in Ireland.³⁵⁰ An employee must present their application for interim relief before the Circuit Court before the end of the period of twenty-one days immediately following the date of dismissal, whether before, on or after that date.³⁵¹ The twenty-one-day time limit for the presentation of an interim relief application is arguably quite short as by the time the employee has been dismissed and seeks legal advice on the matter they may be out of time. Nonetheless, it is much more generous than the seven-day time limit in the UK for the bringing of such applications.³⁵²

The Circuit Court will make an order if, on hearing the employee's application for interim relief, it appears to the Circuit Court that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure.³⁵³ The remedies that can be ordered by the Circuit Court in an interim

³⁴⁸ *A Service Engineer v A Provider of Plant Machinery* ADJ-00007236.

³⁴⁹ Protected Disclosures Act 2014, s 11(2); *ibid* sch 1.

³⁵⁰ Injunctions in employment disputes have been granted in Ireland since the decision of Mr Justice Costello in *Fennelly v Assicurazioni Generali SpA* [1985] 3 ILTR 73 (HC).

³⁵¹ Protected Disclosures Act 2014, sch 1, s 1(2).

³⁵² Employment Rights Act 1996, s 128(2).

³⁵³ Protected Disclosures Act 2014, sch 1, s 2(1).

relief application are discussed in more detail in the ‘Remedy and quantum’ section below. The first reported case in which interim relief was sought was *Philpott v Marymount University Hospital and Hospice Ltd*.³⁵⁴ The applicant herein claimed that he was dismissed by virtue of having made ‘protected disclosures’ within the meaning of the 2014 Act. He sought an order from the court for the continuation of the terms of his contract of employment pending the determination of his unfair dismissal proceedings before what was then the EAT. The applicant had seven months’ service at the date of termination of his contract of employment.

The applicant made his disclosures pursuant to a ‘formal protected disclosures document dated the 7 January 2015’ that was sent to the Board of the respondent. In this document, the applicant claimed that charity funding was being used for needs other than palliative care, that there were significant issues with the respondent’s building which posed and continued to pose critical risk to the health and safety of patients, staff, and the public, and that there was mismanagement by the respondent of financial resources. The respondent asserted that the applicant was dismissed by reason of significant interpersonal difficulties between the applicant and other members of staff, in particular, the executive team.

The Circuit Court refused the applicant’s application on the grounds that he had not satisfied the test that his beliefs and disclosures were reasonable. His Honour Judge O’Donovan stated:

This is an interim application for relief akin to injunctive relief. This Court has only to satisfy itself that the beliefs and disclosures were reasonable and although the Court accepts without reservation the sincerity of the plaintiff, objectively on the facts, in the Court’s view, he has not satisfied that test. Accordingly, the Court refuses interim relief.

It appears from the short judgment issued by the Circuit Court that the court put more weight on whether the applicant’s belief was objectively reasonable rather than on his subjective belief.

On the 28 July 2016, the first interim relief order was granted under the 2014 Act in the matter of *Dougan and Clarke v Lifeline Ambulances Ltd*.³⁵⁵ It was contended by the

³⁵⁴ *Philpott v Marymount University Hospital and Hospice Ltd* [2015] IECC 1.

³⁵⁵ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC). The second, and only other successful interim relief application was in the matter of *Kelly v AlienVault Ireland Ltd and AlienVault Inc* (2016) Irish Examiner, 3 Nov (CC). These cases are discussed further in the ‘Remedy and quantum’ section.

applicants, that a protected disclosure was made by them to the Office of the Revenue Commissioners ('Revenue') in January 2016, that the respondent had been involved in 'serious wrongdoing'.³⁵⁶ Both applicants had sought an order from the court for reinstatement in the positions from which they had been dismissed pending the determination by the WRC or settlement of their unfair dismissal claims. His Honour Judge Comerford held that he could not find that the applicants' dismissal was wholly or mainly due to the protected disclosure they had made to Revenue on the evidence presented to him. However, he held that the applicants did meet the threshold of establishing that there were substantial grounds for contending that their dismissal was wholly or mainly due to the protected disclosure.³⁵⁷ His Honour Judge Comerford made an order for the continuation of the applicants' contracts of employment from the date of termination until the determination or settlement of the dispute for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and also for the purposes of determining the period of reckonable employment.³⁵⁸

The attraction of an interim relief claim from an employee's perspective is that if they are successful, they can continue to be paid until the substantial hearing, which will not have to be reimbursed to their employer if they are unsuccessful at that stage.

Further, a possible advantage for the employee of their application being heard in public before the Circuit Court could mean that the employer is more likely to settle the dispute at an early stage in order to avoid the allegations of wrongdoing being heard, and the parties being identified, in open court. The respondent in *Dougan and Clarke* did not settle the claim until after the interim relief application, but counsel for the respondent argued that for the purpose of the interim relief application, the court ought to proceed on the basis that the presumption in s 5(8) had not been displaced. He submitted that the disclosures constituted protected disclosures and therefore it would be unnecessary to open them to the court on the basis that they concerned the respondent's tax affairs. Thus, although the respondent did not

³⁵⁶ Paul Cullen, 'Whistleblowers accuse David Hall of 'serious wrongdoing' after whistleblowing' *The Irish Times* (Dublin, 29 July 2016) <www.irishtimes.com/news/crime-and-law/courts/district-court/whistleblowers-accuse-david-hall-of-serious-wrongdoing-1.2738889> accessed 13 March 2019; Paul Cullen, 'David Hall ambulance firm ordered to keep paying whistleblowers' *The Irish Times* (Dublin, 29 July 2016) <www.irishtimes.com/news/crime-and-law/courts/district-court/david-hall-ambulance-firm-ordered-to-keep-paying-whistleblowers-1.2739356> accessed 13 March 2019.

³⁵⁷ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC) 218.

³⁵⁸ *ibid.* This remedy is discussed below in the 'Remedy and Quantum' section.

settle the case at this stage, it took a substantial risk in not trying to rebut the presumption in s 5(8) in order to avoid the allegations of wrongdoing being aired in the public domain. Another advantage for the employee is that it may result in a settlement after a successful interim relief application, which was no doubt a significant factor in the settlement of the claim in *Dougan and Clarke* before it progressed to the substantial hearing.

Nevertheless, there are disadvantages to the employee in bringing the claim before the Circuit Court, namely, the risk of costs being awarded against them if they are unsuccessful in their application and exposing any weaknesses in their case to the respondent.

3.4(d) *Penalisation exclusive of unfair dismissal*

Acts and omissions that constitute penalisation, other than unfair dismissal, are dealt with under s 12 and sch 2 of the 2014 Act. The protection from penalisation under s 12 and sch 2 applies to employees only. Under the 2014 Act, an employer may be held vicariously liable in circumstances where they cause or permit any other person to penalise or to threaten penalisation against an employee for having made a protected disclosure.³⁵⁹

An employee is not entitled to bring a claim for penalisation under this section and for unfair dismissal under s 11.³⁶⁰ This can be contrasted with the position in the UK where there is no limitation in relation to the initiation of an unfair dismissal claim and a detriment claim simultaneously. In that regard, a complainant can, therefore, be properly compensated for both acts of retaliation against them. For example, in the UK decision of *Melia v Magna Kansei Ltd*³⁶¹ the claimant was compensated for the detriment that he suffered, prior to his resignation on 9 November 2001, when he was bullied, suspended, and subjected to an investigation for alleged misuse of his employer's computer system on the ground that he had made a protected disclosure. The compensation awarded consisted of damages for injury to his feelings occasioned by the detriment. The claimant was also awarded compensation for the loss that he sustained because of his constructive dismissal. The position adopted in Ireland means that an employee who is dismissed wholly or mainly for having made a protected disclosure cannot also claim for any act of penalisation that they suffered before the dismissal, which leaves them without a remedy for any other wrongs suffered by them

³⁵⁹ Protected Disclosures Act 2014, s 12(1). Further, a person in employment as a member of the Defence Forces, the Judge Advocate-General, the chairman of the Army Pensions Board or the ordinary member thereof who is not an officer of the Medical Corps of the Defence Forces, are precluded from bringing an application under s 12/sch 2 of the 2014 Act.

³⁶⁰ *ibid* s 12(2).

³⁶¹ *Melia v Magna Kansei Ltd* [2006] ICR 410 (CA).

for having made a protected disclosure. For example, in *An Employee v A Nursing Home*,³⁶² the Adjudication Officer held that the complainant was dismissed for having made a protected disclosure. However, prior to her dismissal she was subjected to isolation and gave evidence that she began to feel ‘frozen out’ after having made her protected disclosure. She submitted that there was a marked change in the attitude of management towards her after she made her protected disclosure and that she was not informed about policy changes and other relevant information that was communicated to her colleagues. Also she was allegedly threatened by her employer when she was ‘verbally attacked’ for ten minutes in full view of passers-by, including members of staff and family members of residents. During this altercation, the complainant alleged that she was told that she ‘better be careful’ and ‘how dare’ she question the necessity of certain practices. Prior to her dismissal, she went on sick leave due to stress arising from the situation, and she required sleeping tablets whilst she was on sick leave, as well as being prescribed anti-depressants for low mood. Unfortunately, due to the limitation in s 12(2) of the 2014 Act, the complainant herein could not be compensated for those detrimental acts but only for the unfair dismissal.

As stated above, the majority of the claims under the 2014 Act, ie 48% (eighteen) of the claims, were brought under s 12.³⁶³ There were twenty-seven penalisation cases, seventeen before the WRC, nine of which were appealed to the Labour Court, and one case pre-dated the establishment of the WRC and was heard by the LRC. Of those cases, only three were successful, which equates to only 11%.

The test for determining whether a worker has been penalised for having made a protected disclosure was laid down by the Labour Court in the decision of *Monaghan v McGrath Partnership*.³⁶⁴ This case concerned a complaint by the complainant, that in consequence of having made protected disclosures to her employer, the respondent, regarding the treatment of patients at its nursing home and to HIQA, she suffered penalisation in the form of intimidation, bullying, alienation, harassment, victimisation and suspension from duty on basic pay only from 20 June 2014 to 7 November 2014 and suspension without pay from 7 November 2014. At first instance, the Adjudication Officer had held that the worker’s issues

³⁶² *An Employee v A Nursing Home* ADJ-00000456.

³⁶³ This percentage was calculated using thirty-seven cases as eleven of the forty-eight cases were appealed so those eleven cases have the same type of claim.

³⁶⁴ *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC).

with her employer were not related to any protected disclosures as defined by the 2014 Act and accordingly that there was no penalisation.³⁶⁵

In order to determine a complaint of penalisation under the 2014 Act, the Labour Court held that it must: (i) establish that a protected disclosure had been made; and (ii) if it is established that a protected disclosure was made by the worker, then it must examine whether a penalisation within the meaning of the 2014 Act has occurred.³⁶⁶

With regard to the first aspect of the test, the Labour Court referred to the definition of a ‘protected disclosure’ under s 5, however, it did not shed any light on the question of what constitutes a protected disclosure. The Labour Court based its determination solely on the evidence before it that the respondent had been informed by the complainant at a staff appraisal meeting on 29 April 2014 of information concerning alleged wrongdoings relating to the endangerment of the health and safety of patients that the worker reasonably believed was occurring in the nursing home and which had come to her attention in connection with her employment.³⁶⁷

With respect to the second aspect of the test, this required an examination of whether the worker had been subjected to penalisation as defined under the 2014 Act for having made a protected disclosure. The Labour Court referred to s 27 of the Safety, Health and Welfare at Work Act, 2005 (‘2005 Act’) to guide them in this determination. Section 27 of the 2005 Act provides for protection against dismissal and penalisation and is broadly similar to the penalisation protection under the 2014 Act. In assessing this question, the Labour Court relied on its decision of *O’Neill v Toni and Guy Blackrock Ltd*³⁶⁸ where it was held that in order to make out a complaint of penalisation, the complainant is required to establish that the detriment that he or she is alleging was imposed ‘for’ having committed one of the acts protected by s 27(3) of the 2005 Act. Based on this interpretation of penalisation under the 2005 Act in the *O’Neill* case, the Labour Court stated that the act or omission that is being complained of must have been incurred because of, or in retaliation for, the worker having made a protected disclosure.³⁶⁹

³⁶⁵ *Monaghan v McGrath Partnership* r-151162-pd-1415R.

³⁶⁶ *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC) 15.

³⁶⁷ *ibid.*

³⁶⁸ *O’Neill v Toni and Guy Blackrock Ltd* [2010] ELR 21 (LC).

³⁶⁹ *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC) 15.

The Labour Court elaborated on this test further, and stated that where there is more than one causal factor in the chain of events leading up to the act or omission complained of, the making of the protected disclosure must be an operative cause of the penalisation, meaning that ‘but for’ the worker having made the protected disclosure he or she would not have been subjected to the act or omission complained of.³⁷⁰ The Labour Court directed that in assessing this question, a consideration of the motive or reasons which influenced the decision maker to subject the worker to the act or omission complained of must be undertaken.³⁷¹

The Labour Court was of the view that even though the *O’Neill* case involved a question of penalisation under the 2005 Act, the general principle enunciated in this case remained valid to the case under consideration.³⁷²

In applying this interpretation of penalisation, the Labour Court assessed the allegations of penalisation separating the allegations into three distinct claims of: (i) intimidation, bullying, alienation, harassment, and victimisation; (ii) suspension from 20 June 2014 to 7 November 2014; and (iii) suspension from 7 November 2014, and found that only the second claim of penalisation could be upheld. The Labour Court stated that:

In such circumstances, the Court must find that the making of a protected disclosure to her employer was an operative reason for placing the Complainant on suspension from work for the period from 20 June until 7 November 2014. The Court finds that the detriment giving rise to the complaint incurred because of, or in retaliation for, the disclosure of information related to the alleged abuse and alleged wrongdoings regarding patient care made by the Complainant on 29 April 2014. For all of the forgoing reasons, the Court is satisfied that were it not for that complaint the Complainant would not have been placed on suspension.³⁷³

The Labour Court, therefore, varied the decision of the Adjudication Officer and allowed the appeal in part in finding that the complainant was penalised for having made a protected disclosure when she was placed on suspension from 20 June 2014 to 7 November 2014 and ordered that the respondent pay her compensation in the amount of €17,500.³⁷⁴

The second successful penalisation case was *A Complainant v A Respondent*,³⁷⁵ where the WRC determined that a suspension and disciplinary sanction constituted penalisation and

³⁷⁰ *ibid* 15-16.

³⁷¹ *ibid* 16.

³⁷² *ibid*.

³⁷³ *ibid* 17-18.

³⁷⁴ *ibid* 18.

³⁷⁵ *A Complainant v A Respondent* ADJ-00004519.

that this was imposed in order to penalise the complainant for having made a protected disclosure under the 2014 Act. The Adjudication Officer stated that:

The process of investigation and discipline were a sham in this case and there was therefore no justification whatsoever in imposing a disciplinary sanction against the complainant other than to penalise him for having made a protected disclosure under the Act.

In these circumstances therefore I am satisfied that the disclosure made in May was an operative consideration leading to the discipline and consequently that there was a causal link between the penalisation imposed and the protected disclosure made.

The third successful penalisation case was *An Employee v A Public Body*,³⁷⁶ where the WRC held that the complainant had been subjected to unfair treatment under s 3(1)(e) of the 2014 Act because he had made a protected disclosure in respect of an inefficient use of taxpayers' funds. This unfair treatment was found to be a failure on the part of the respondent to inform the complainant that an extremely serious potential security threat to the complainant and his family did not exist, despite knowing for fifteen months that this was the case and being aware of the effects of the matter on the complainant's family.

Interestingly, in the two successful penalisation cases outlined above that followed the *McGrath Partnership* case, neither referred to this case. Of those penalisation claims where it was determined that a protected disclosure had been made but that there was no penalisation, the 'but for' test laid down in *McGrath Partnership* was referred to in 67% (four) of the cases.³⁷⁷

As discussed in the 'Win/Lose' section below, the majority of the penalisation claims lost on procedural grounds.³⁷⁸ Of those claims that lost on procedural grounds, 56% (three) were unsuccessful because they were deemed to be out of time. This time limit for presenting a claim to the Director General of the WRC has been applied quite stringently, and in a penalisation claim, the WRC will not take into consideration any act or omission that occurred outside of the six-month period prior to the receipt of the claim. So for example, in *Accounts Administrator v A University*³⁷⁹ the claim was received by the WRC on 28 June 2016, however, the complainant stated that the penalisation commenced when she was suspended on 12 June 2015. Therefore, the WRC held that it was prohibited to deal with the

³⁷⁶ *An Employee v A Public Body* ADJ-00005583.

³⁷⁷ *A Senior Official v A Local Authority* ADJ-00001721; *Mr A(1) v A Government Department* ADJ-00006381; *Enterprise Ireland v Carroll* PDD 3/2018; *Fingal CC v O'Brien* PDD 4/2018.

³⁷⁸ Thirty-three per cent of the penalisation claims were unsuccessful on procedural grounds.

³⁷⁹ *Accounts Administrator v A University* ADJ-00004380.

claim, as it had no jurisdiction because the claim was submitted out of time, holding that ‘the date of contravention which the complaint relates to began over twelve months before the claim was submitted to the WRC.’

In contrast, in the UK, where the claim must be presented before the end of the period of three months, beginning on the date of the act or failure to act to which the complaint relates,³⁸⁰ the UKEAT held in *Tait v Redcar and Cleveland BC*³⁸¹ that a suspension is an act which extends over a period and therefore the last day of the suspension is considered to be the date on which the employee is informed that the suspension is at an end. The appellant relied on s 48(3)(a) of the Employment Rights Act 1996 (‘1996 Act’) which provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure. Section 48(4)(a) of the 1996 Act provides that ‘where an act extends over a period, the ‘date of the act’ means the last day of that period.’ The UKEAT referred to the principal authorities on the meaning of the phrase ‘an act extending over a period’ in the equivalent provisions in discrimination legislation and held that:

With the benefit of that elucidation, it seems to us that a disciplinary suspension is clearly “an act extending over a period” within the meaning of the statute. Although there is no doubt an initial “act” of suspension, the state of affairs thereafter in which the employee remains suspended pending the outcome of the disciplinary proceedings can quite naturally be described not simply as a consequence of that act but as a continuation of it.³⁸²

Unfortunately, neither the 2014 Act nor the 2015 Act provides for a time limit where there are a series of similar acts or failures, and it would not be open to an Adjudication Officer to rely on discrimination legislation, as the language used therein is different to that in the 2015 Act and the 2014 Act.³⁸³ Therefore, even though the complainant in *Accounts Administrator v A University*³⁸⁴ was still suspended at the time that the complaint was received by the WRC on 28 June 2016, this, unfortunately, was not capable of being subject to a penalisation

³⁸⁰ Employment Rights Act 1996, s 48(3). *ibid* s 48(3)(b), provides that this time period may be extended ‘within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.’

³⁸¹ *Tait v Redcar and Cleveland BC* (UKEAT/0096/08/ZT, 2 April 2008).

³⁸² *ibid* [2(6)].

³⁸³ Employment Equality Act 1998, s 77(5)(a), as inserted by Equality Act 2004, s 32, provides that ‘a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.’

³⁸⁴ *Accounts Administrator v A University* ADJ-00004380.

assessment. This is clearly a limitation under the 2014 and 2015 Acts and undoubtedly led to an injustice being suffered by the complainant. Subsequent to this decision, the complainant was subject to a further six months of suspension, until it was lifted by the respondent in November 2017, following the publication of a report³⁸⁵ that vindicated some of the complainant's allegations.³⁸⁶ The complainant subsequently received payment from the respondent in June 2018 following a settlement agreement facilitated by a mediation process.³⁸⁷ Despite the filing of the complaint in June 2016, the time frame for the amelioration of the penalisation suffered by the complainant was unnecessarily protracted due to the limitations under the relevant legislation. The inclusion of a provision similar to that in s 48(3)(a) of the 1996 Act in the 2015 Act would be a much more reasonable approach.

The six-month time limit was misinterpreted in the matter of *AIB v Murphy*³⁸⁸ when the Labour Court required that the protected disclosure was made in the cognisable period and refused jurisdiction on the basis that the complainant did not identify any such disclosure. This decision is entirely erroneous as based on s 5(1) of the 2014 Act there is no time limit in relation to the disclosure itself, s 41(6) of the 2015 Act only applies to the penalisation.

Arguably, the six-month time limit is far too short for the initiation of a penalisation claim as the alleged act or omission constituting penalisation may be ongoing for an extended period and yet the complainant can only be compensated for the penalisation that occurred in the six-month time period before the claim is filed.

3.5 Length of service

3.5(a) Introduction

Under the 2014 Act, there is no continuous service requirement in order for workers to attract protection. Notably, employees are protected from unfair dismissal from the first day of their

³⁸⁵ Richard Thorn, 'Independent Review of Certain Matters and Allegations Relating to the University of Limerick' *Final Report* (October 2017).

³⁸⁶ Maria Flannery, 'University of Limerick president lifts suspension on whistleblowers and offers widespread apologies' *Limerick Leader* (Limerick, 23 November 2017) <www.limerickleader.ie/news/home/283601/breaking-university-of-limerick-president-lifts-suspension-on-whistleblowers.html> accessed 1 October 2018.

³⁸⁷ Carl O'Brien, 'UL makes settlements of up to €150,000 with whistleblowers' *The Irish Times* (Dublin, 18 June 2018) <www.irishtimes.com/news/education/ul-makes-settlements-of-up-to-150-000-with-whistleblowers-1.3534094> accessed 1 October 2018.

³⁸⁸ *AIB v Murphy* PDD 1/2018.

employment.³⁸⁹ Normally, for unfair dismissal claims, employees must have one-year's continuous service.³⁹⁰ Further, under s 13 of the 2014 Act, a person is protected from discrimination, disadvantage, or adverse treatment in relation to prospective employment and will therefore not need to demonstrate any length of service to bring their claim.³⁹¹

The findings of the case law analysis³⁹² regarding the length of service of complainants are as follows:

³⁸⁹ Unfair Dismissals Act 1977, s 6(2D), as inserted by Protected Disclosures Act 2014, s 11(1)(c). This reflects the position in the UK under Employment Rights Act 1996, s 108(3)(ff).

³⁹⁰ *ibid* s 2(1)(a). In the UK, Employment Rights Act 1996, s 94, which protects employees from unfair dismissal, does not apply to employees who commenced employment on or after 6 April 2012, unless the employee has two years' continuous service. *ibid* s 108(1) provides that a one-year's continuous service requirement applies to those who commenced work prior to 6 April 2012.

³⁹¹ Protected Disclosures Act 2014, s 13(3)(b).

³⁹² Thirty-six cases, instead of forty-eight, were assessed for the purpose of ascertaining the length of service of complainants because eleven cases were appealed and therefore had the same complainant and three cases were the connected cases of 'Mr A'. Further, the reason why thirty-six cases were assessed, instead of thirty-five, was due to the fact that there were two applicants in one case (*Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC)).

Table 3.1 Case law analysis of the length of service of complainants (n=36)

Length of service of complainant	Percentage
Less than 1 year	25%
1 yr-5 yrs	22%
6 yrs-10 yrs	14%
11 yrs-15 yrs	5.5%
16 yrs-20 yrs	5.5%
More than 21 yrs	17%
No details	11%

3.5(b) Claims by workers with less than one-year's continuous service

As can be seen from the results, the majority of the claims were brought by those who had less than one-year's continuous service. Eighty-nine per cent (eight) of the claims brought by those with less than one-year's continuous service were interim relief/unfair dismissal claims, whilst 11% (one) of these claims were penalisation claims. There is a risk that the 2014 Act could be abused by employees who do not have the requisite period of continuous employment to bring an ordinary unfair dismissal claim. However, of those interim relief/unfair dismissal claims that were brought by employees who had less than one-year's continuous service, 50% were successful, which represents 40% (four) of the overall successful cases under the 2014 Act, and 50% were unsuccessful. These findings demonstrate that not all claims were brought in order to abuse the legislation.

Of those unsuccessful claims, the reason why the claims failed was that in all cases no protected disclosure was made. As discussed in the 'Type of claim' section above, in *Philpott v Marymount Hospital and Hospice Ltd*³⁹³ His Honour Judge O'Donohoe accepted the applicant's sincerity but held that he did not satisfy the requirement that his beliefs were objectively reasonable. However, the other three unsuccessful unfair dismissal claims brought by employees who had less than one-year's continuous service related to personal grievances.³⁹⁴ This indicates that there may be instances where a complainant may attempt to exploit the 2014 Act to allege they were dismissed unfairly for having made a protected disclosure because they do not qualify for an ordinary unfair dismissal claim. For example, in *A Senior Account Manager v A print Management and Logistics Company*³⁹⁵ the complainant alleged that he was dismissed by the respondent for making a protected disclosure on 21 July 2016 by disclosing that the respondent had breached a service agreement between it and a publicly funded organisation by ordering items of print from a supplier at an excessive price and that this was effectively a misuse of public funds. The respondent refuted this claim and argued that the complainant was dismissed on 5 October 2016 for poor performance during the probationary period and on that date, he made an alleged protected disclosure, which was subsequently submitted in writing on 10 October 2016. The respondent argued that the alleged disclosure on 21 July 2016 was not a protected disclosure and that it was 'contrary to the spirit of the legislation to attempt to manufacture

³⁹³ *Philpott v Marymount Hospital and Hospice Ltd* (2015) IECC 1.

³⁹⁴ *A Senior Account Manager v A print Management and Logistics Company* ADJ-00005984; *An Employee v An Agency* ADJ-00008429; *A Service Engineer v A Provider of Plant Machinery* ADJ-00007236.

³⁹⁵ *A Senior Account Manager v A print Management and Logistics Company* ADJ-00005984.

such a disclosure and then claim to have been penalised in the form of a dismissal as a result.’ The Adjudication Officer found that on the balance of probabilities, the respondent would have had no reason to instruct the complainant to order items from a preferred supplier at an excessive cost, especially taking into consideration the approved list of suppliers and price matrix in place. Further, the Adjudication Officer stated that:

I find that the conversation the complainant submits took place on the 21st July 2016 was more likely as a result of what had been notified to him at the performance meeting held on the 19th July rather than a legitimate disclosing of a wrongdoing or a failure on the Respondent’s part to comply with a legal obligation as is being claimed by the complainant.

Consequently, the Adjudication Officer held that the complainant did not make a protected disclosure on 21 July 2016.

Further, in *An Employee v An Agency*³⁹⁶ the complainant, who had commenced employment with the respondent on 18 April 2016 under a fixed term contract, which expired on 31 January 2017, alleged that he was unfairly dismissed when the respondent failed to renew his contract on its expiration. He alleged that the decision not to renew his contract was taken because he made a protected disclosure to his employer and a client company. The complainant alleged this his protected disclosure was that he had complained about his health and safety to the extent that his mental health was affected and that he wanted a transfer as a result of inappropriate behaviour from his manager following an intimate encounter with her. The respondent submitted that the complainant did not make a protected disclosure and argued that it had not been made aware of this encounter until after the expiry of the complainant’s fixed-term contract. The respondent argued further that the complainant presented no evidence that his health and safety was endangered and that he had never raised any issue or grievance with the respondent during his employment. The respondent contended that the complainant’s employment terminated on 31 January 2017 on expiry of his fixed-term contract.

The Adjudication Officer noted that in evidence at the hearing there was no mention of any protected disclosure nor was there any evidence of any complaint that the complainant’s health and safety were at risk. The Adjudication Officer did refer to evidence of a meeting on 16 December 2017 where the complainant gave an account of the incident and subsequent inappropriate behaviour from the store manager. In finding that the complainant had not

³⁹⁶ *An Employee v An Agency* ADJ-00008429.

made a protected disclosure, the Adjudication Officer referred to the WRC Code of Practice on the 2014 Act³⁹⁷ and set out its position on the difference between a grievance and a protected disclosure, quoting as follows:

What is the difference between a grievance and a Protected Disclosure?

30. A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation's Grievance Procedure.

The Adjudication Officer proceeded to find that a 'protected disclosure is where a worker has information about a relevant wrongdoing. I am unable to find that the complainant made a protected disclosure within the meaning of this Act as claimed.'

Although there have been a low number of claims brought under the 2014 Act to defeat the one-year service requirement for ordinary unfair dismissal claims, this may be an area to monitor as the case law in this area increases in order to uncover any pattern of misuse of the legislation.

3.6 Nature of disclosure: relevant wrongdoings

3.6(a) Introduction

The 2014 Act provides protection to workers who make a disclosure of relevant information (whether before or after the date of the passing of the 2014 Act) in the manner specified in ss 6, 7, 8, 9, or 10 of the 2014 Act. The definition of 'disclosure' under the 2014 Act covers circumstances where the information disclosed is information of which the person receiving the information is already aware and provides that it means in those circumstances 'bringing to the person's attention'.³⁹⁸ 'Relevant information' is information that in the reasonable belief of the worker, tends to show one or more relevant wrongdoings.³⁹⁹ This relevant information must come to the worker's attention in connection with his employment.⁴⁰⁰

The 2014 Act sets out what types of wrongdoing qualify as a relevant wrongdoing, and this covers an extensive range of acts:

(a) that an offence has been, is being or is likely to be committed,

³⁹⁷ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464.

³⁹⁸ Protected Disclosures Act 2014, s 3(1).

³⁹⁹ *ibid* s 5(2)(a).

⁴⁰⁰ *ibid* s 5(2)(b).

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged,
- (f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,
- (g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or
- (h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.⁴⁰¹

A breach of the worker's contract of employment is explicitly excluded from the scope of the 2014 Act to prevent the 2014 Act from being used as an alternative to existing grievance procedures for disputes on employment contracts. Such an exclusion was necessary in order to avoid a situation occurring in Ireland that occurred in the UK after the decision of the UKEAT in *Parkins v Sodexho*.⁴⁰² The UKEAT held, in this case, that information disclosed by a person in relation to a breach of their employment contract by their employer fell within the requirements of a protected disclosure under s 43B(1)(b) of the 1996 Act.⁴⁰³ Section 43B(1)(b) of the 1996 Act provides that a 'qualifying disclosure' includes any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.'⁴⁰⁴ This decision was not wrong when one looked at a literal interpretation of the legislation. Why should the phrase 'any legal obligation to which he is subject' apply only to statutory obligations but not to employment contract obligations? Nonetheless, it was contrary to the spirit of the legislation, as it was never envisaged that the 1996 Act would apply to a breach of a worker's own employment contract that does not

⁴⁰¹ *ibid* s 5(3)(a)-(h).

⁴⁰² *Parkins v Sodexho* [2002] IRLR 109 (EAT).

⁴⁰³ *ibid* [15]-[16].

⁴⁰⁴ Employment Rights Act 1996, s 43B(1)(b), as inserted by Public Interest Disclosure Act 1998, s 1.

engage the public interest.⁴⁰⁵ The decision in *Parkins* was followed by the UKEAT in *Finchman v H M Prison Service*⁴⁰⁶ and *Kraus v Penna plc*.⁴⁰⁷ In order to curtail the impact of these rulings s 43B(1) of the 1996 Act was amended by s 17 of the Enterprise and Regulatory Reform Act 2013 in June 2013. This section introduced the requirement that the disclosure made by the worker must be in the public interest.⁴⁰⁸ This amendment is intended to close the loophole that allowed workers to make a protected disclosure in relation to matters that were purely of a private nature rather than being in the public interest.

It is arguable that the approach adopted in the UK, where a public interest test was introduced, is a better one than that adopted in Ireland, which excludes a breach of the worker's contract of employment. The approach adopted in Ireland was mooted in the UK, but this was rejected by the responsible Minister, Mr Norman Lamb, at committee stage of the Enterprise and Regulatory Reform Bill 2012, where he stated:

[A]lthough our aim is to prevent the opportunistic use of breaches of an individual's contract that are of a personal nature, there are also likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues. In other words, in a worker's complaint about a breach of their contract, the breach in itself might have wider public interest implications.⁴⁰⁹

This reservation expressed by former Minister Lamb is a valid one. There is a very real chance that in a disclosure there may be an intermingling of issues that may constitute both

⁴⁰⁵ The explanatory memorandum to the Enterprise and Regulatory Reform Act 2013 provides that 'The Employment Appeal Tribunal decision in *Parkins v Sodexho Ltd* [2002] IRLR 109 (EAT) raised the possibility that any complaint about any aspect of an individual's employment contract could lay the foundation for a protected disclosure. This has led to claims being lodged at employment tribunals that would not otherwise have been brought and is contrary to the intention of the legislation.' Explanatory Memorandum to the Enterprise and Regulatory Reform Act 2013, para 103.

⁴⁰⁶ *Finchman v H M Prison Service* (UKEAT/0925/01/RN, 19 December 2001).

⁴⁰⁷ *Kraus v Penna plc* [2004] IRLR 260 (EAT).

⁴⁰⁸ Enterprise and Regulatory Reform Act 2013, s 17 amends Employment Rights Act 1996, s 43B(1)(b) and provides that 'For this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following...' *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 314 laid down the test for 'in the public interest' and stated in para 37 that the question of whether the disclosure was made 'in the public interest' depends on the circumstances of the particular case but that the fourfold classification of relevant factors as set out by Mr. Laddie QC, counsel for the claimant, are a useful tool. Those factors are as follows '(a) the numbers in the group whose interests the disclosure served...; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer..."the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"'. *ibid* [34].

⁴⁰⁹ Enterprise and Regulatory Reform Bill Deb 3 July 2012, col 388.

a personal grievance and a protected disclosure. For example, a worker may raise a concern that they are not being paid the minimum wage as agreed under the contract of employment. This is clearly a personal grievance; however, it is also a breach of s 35 National Minimum Wage Act 2000, which deems it a criminal offence not to pay the national minimum wage.⁴¹⁰ Also, under s 4 Payment of Wages Act 1991, it is an offence for an employer to fail to give to an employee a statement in writing specifying clearly the gross amount of the wages payable to the employee and the nature and amount of any deduction therefrom.⁴¹¹ Disclosures of this nature, despite having a personal grievance dimension would still fall within the ambit of the 2014 Act due to the public interest element, the commission of a criminal offence.

The word ‘likely’ appears in all but one of the relevant wrongdoings. The meaning of the word ‘likely’ in the equivalent UK provision was determined in *Kraus v Penna PLC*.⁴¹² The UKEAT held that the word ‘likely’ denotes a requirement of more than a possibility or risk that an employer might fail to comply with a relevant legal obligation. Cox J stated that:

The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation.⁴¹³

3.6(b) Case law analysis

For the purposes of the analysis of the case law in this section, thirty-five cases could be assessed. This is because of the total forty-eight cases, eleven were appealed to the Labour Court, and three cases are related⁴¹⁴ and therefore concern the same disclosure of alleged wrongdoing. It was accepted in fifteen of those cases that the disclosure made by the complainant constituted a protected disclosure, and therefore it was accepted that the wrongdoing disclosed constituted a relevant wrongdoing under the 2014 Act (however, see comment below on multiple disclosure cases). In that regard, for the purpose of the assessment of the nature of the disclosure, this assessment was limited to those fifteen cases as in the other twenty cases it was either not determined by the Circuit Court, WRC, or

⁴¹⁰ National Minimum Wage Act 2000, s 35.

⁴¹¹ Payment of Wages Act 1991, s 4.

⁴¹² *Kraus v Penna PLC* [2004] IRLR 260 (EAT).

⁴¹³ *ibid* [24].

⁴¹⁴ *Mr A v A Public Body* ADJ-00006360; *Mr A(1) v A Government Department* ADJ-00006381; *Mr A(2) v A Government Department* ADJ-00009800.

Labour Court that the disclosures made constituted a relevant wrongdoing, or it was rejected that the disclosure constituted a relevant wrongdoing.

Forty per cent (fourteen) of the cases concerned one relevant wrongdoing, whilst 60% (twenty-one) of the cases concerned multiple wrongdoings. Of the cases concerning multiple wrongdoings, 33% (seven) of the cases concerned four wrongdoings, 22% (five) concerned three wrongdoings, whilst 44% (nine) of the cases concerned two wrongdoings. It is not clear in all of the cases concerning multiple wrongdoings whether all the wrongdoings were accepted to be relevant wrongdoings. However, the assessment of the case law herein proceeded on the presumption that all wrongdoings were considered to be relevant wrongdoings as it was accepted by the WRC that a protected disclosure had been made, without always indicating which wrongdoing constituted the protected disclosure.

In relation to the single relevant wrongdoing cases, 50% (seven) of the cases concerned health and safety, 17% related to abuse in care, 17% related to a criminal offence and 17% related to a breach of a legal obligation.

In contrast, in the UK, the most common disclosure assessed in the case law was discrimination and harassment (17% in 2009-10 and 18% in 2011-13).⁴¹⁵ With respect to health and safety, the case law data in the UK was divided into ‘Public safety’, which stood at 5% in both 2009-10 and 2011-13, and ‘Work safety’ which accounted for 12% of the disclosures in both 2009-10 and 2011-13. Abuse in care accounted for 2% of health and safety disclosures in the case law in both 2009-10 and 2011-13. These findings can be compared to the number of the calls received by Protect’s advice line in 2011-13 in relation to abuse of care, which is somewhat higher at 8%.⁴¹⁶ TII has reported that in Ireland in 2015-16, 2.4% of the calls to its helpline concerned ‘Abuse and Neglect’.⁴¹⁷ Cases in the UK concerning multiple wrongdoings stood at 11% in 2009-10 and at 23% in 2011-13,⁴¹⁸ which is significantly lower than the case law in Ireland concerning multiple disclosures, which is at 60%.

3.6(b)(i) *Personal grievances*

⁴¹⁵ Protect, ‘Whistleblowing: Time for Change, A 5 year review by Public Concern at Work’ (Protect July 2016) 29. This is the most recent data available on this issue.

⁴¹⁶ *ibid.* This is the most recent data available on this issue.

⁴¹⁷ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 26.

⁴¹⁸ Protect, ‘Whistleblowing: Time for Change, A 5 year review by Public Concern at Work’ (Protect July 2016) 29. This is the most recent data available on this issue.

As discussed above, the 2014 Act is intended to exclude purely personal grievances. In 17% (six) of the thirty-five cases included in this assessment, the WRC held that the disclosure was a personal grievance and not a protected disclosure. In 83% (five) of the cases where the disclosure was deemed to be a personal grievance, there was a reference to the WRC Code of Practice on the 2014 Act. The WRC Code of Practice on the 2014 Act outlines the difference between a grievance and a protected disclosure and defines a grievance as ‘a matter that is specific to the worker i.e. that worker’s employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation’s Grievance Procedure. A protected disclosure is where a worker has information about a relevant wrongdoing.’⁴¹⁹ It also includes examples in order to highlight the difference between a grievance and a disclosure.⁴²⁰

A good example of the weight placed on this WRC Code of Practice on the 2014 Act is in the decision of *A Commercialisation Specialist v A Government Agency*⁴²¹ where the Adjudication Officer specifically stated ‘Finally I would like to stress the relevance of SI464/2015 the Statutory code on Whistleblowing /Protected Disclosure. This gives very clear guidance on assisting a workplace to appreciate the differences in Grievances and Protected Disclosure.’ Further, in *Training Co-ordinator v A Social Support Service*⁴²² the Adjudication Officer highlighted that ‘I have taken some guidance from S.I 464,2015 on the Statutory Code of Practice on Protected Disclosures’ and proceeded to set out the example given in the WRC Code of Practice on the 2014 Act of the difference between a grievance and a protected disclosure.

It is questionable, however, whether all disclosures in the relevant case law could be classified as personal grievances. In some cases, this was obvious, ie a disclosure concerning changes to the complainant’s terms and conditions of employment, which had taken place without discussion or agreement,⁴²³ but in others, there was arguably an intermingling of issues. For example, in *A Service Engineer v A Provider of Plant Machinery*⁴²⁴ the Adjudication Officer placed weight on the fact that the complainant did not classify the

⁴¹⁹ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 [30].

⁴²⁰ *ibid* [31].

⁴²¹ *A Commercialisation Specialist v A Government Agency* ADJ-00007228.

⁴²² *Training Co-ordinator v A Social Support Service* ADJ-00002320.

⁴²³ *A Worker v An Agricultural Estate* ADJ-00000860.

⁴²⁴ *A Service Engineer v A Provider of Plant Machinery* ADJ-00007236.

content of his disclosure as being an ‘offence’ until after he was dismissed. The complainant alleged that he had raised the issue of the payment of overtime and the recording of same at a meeting on 27 May 2016. It was accepted by the Adjudication Officer that the issue of overtime payment had been made on that date and also in an appeal letter sent to the Appeal Manager in or around 16 June 2016. The Adjudication Officer held that the matter of overtime payment was one that ‘squarely falls within the scope of his contract of employment’ and that ‘While the overtime issue was raised in May 2016 and during the appeal, the first mention of there being “an offence” was the letter of the 19th July 2016, after the dismissal was confirmed on appeal. It follows that the issues raised by the complainant while in employment cannot amount to a protected disclosure pursuant to section 5(3)(a).’ In his decision, the Adjudication Officer referenced the offence that would be encompassed by the complainant’s assertion that one had been committed as being an offence under s 25 of the Organisation of Working Time Act 1997 in relation the preservation of working time records. However, in order for the complainant to make a protected disclosure, it is not necessary for the complainant to identify the relevant wrongdoing to which their disclosure relates.⁴²⁵ All that is required is that the complainant makes a disclosure of information that they reasonably believe tends to show a relevant wrongdoing. Therefore, the focus of the Adjudication Officer should not have been on the respondent’s argument that the complainant had only mentioned an ‘offence’ in his letter post-dismissal but whether the information disclosed at the meeting of 27 May 2016 or in his appeal letter prior to his dismissal tended to show a relevant wrongdoing. The evidence of the complainant was that at the meeting of 27 May 2016 he raised concerns that overtime was not being recorded. The Branch Manager of the respondent gave evidence that he had met with the complainant on 27 May 2016 and was ‘then aware of the overtime issue’ but submitted that the complainant had not mentioned records or an offence being committed. In cross-examination, the Branch Manager of the respondent accepted that there was a legal obligation to maintain working time records, but when asked for the time sheets for October 2015 to February 2016, he replied that there were no records. This evidence puts some weight behind the complainant’s contention that he made a disclosure where he reasonably believed that the respondent was not maintaining working time records.

⁴²⁵*Darnton v University of Surrey* [2003] ICR 615 (EAT); *Babula v Waltham Forest College* [2007] ICR 1026 (CA). What is required is that the adjudication body identifies the legal obligation that has been breached. *Eiger Securities LLP v Korshunova* [2017] ICR 561 (EAT).

It is arguable that in proceedings under the 2014 Act much time is being taken up with assessing the difference between a personal grievance and a protected disclosure and with focussing on whether the disclosure arises under the worker's contract of employment. This is resulting in disclosures that may have an intermingling of issues falling foul of the exclusion in s 5(3)(b) of the 2014 Act and arguably a public interest test, as adopted in the UK, would be a better approach so as to ensure that such disclosures attract the protections under the 2014 Act.

3.7 Channel of disclosure

3.7(a) *Introduction*

The 2014 Act provides for a stepped disclosure regime whereby the worker must comply with certain requirements when making their disclosure to specific recipients in order for their disclosure to attract the protections contained in the 2014 Act. The stepped disclosure regime contains three distinct levels of disclosure requirements: (i) the first step covers disclosures to the worker's employer, a Minister, and to a legal advisor in the course of obtaining legal advice; (ii) the second step is a disclosure to a prescribed person; and (iii) the third step is a disclosure in other cases other than to those recipients in the first and second steps. It is not necessary for a worker to make their disclosure via the first or second step before making their disclosure through the third step but the higher a worker goes up the stepped disclosure regime when making their disclosure, the more requirements that they have to satisfy in order for their disclosure to be considered a protected disclosure. The purpose of such provisions is to incentivise workers to raise concerns, in the first instance, with their employer.⁴²⁶ Internal reporting allows the employer to react swiftly when allegations or concerns arise and gives them the opportunity to deal with them effectively to prevent or limit the ensuing damage. However, if having made a disclosure to their employer, the employer fails to act on the information disclosed, or the worker does not wish to avail of the internal disclosure channel, alternative channels are provided for under the 2014 Act. Nonetheless, there is evidence that if a worker makes their disclosure externally, the risk of retaliation against them is increased, irrespective of whether the external disclosure occurs subsequent to an internal disclosure or it is made external in the first

⁴²⁶ Protected Disclosures Act 2014, s 6.

instance.⁴²⁷ One study identified that the risk of maltreatment by managers was more than four and a half times greater when the investigation of the wrongdoing did not remain internal to the organisation but progressed externally.⁴²⁸ It also appears that the nature of the retaliation differs depending on whether the worker made their disclosure internally or externally, where the former attracts a quick dismissal, and the latter suffers ‘a longer process of discrediting’ prior to dismissal.⁴²⁹

3.7(b) *Case law analysis*

The incentivised nature of the 2014 Act for the making of internal disclosures by workers is reflected in the analysis of the case law decided under the legislation between 15 July 2014 and 16 July 2018.⁴³⁰ In 89% (thirty-one) of the cases, the worker made their disclosure internally in the first instance to their employer. In the remaining 11% (four) of the cases, there is no information to whom the disclosure was made. Therefore, of the information that is available, none of the cases indicated that a disclosure was made externally in the first instance.

This practice of making disclosures internally in the first instance can be seen in other studies carried out in Ireland and elsewhere. The Irish IAW survey asked 878 employees in the private and non-profit sectors to whom they would share a concern that wrongdoing was taking place in the workplace, and 90% responded that they would report their concern to their line manager, senior manager, or board member within their organisation.⁴³¹

⁴²⁷ Janet P Near and Marcia P Miceli, ‘Retaliation against Whistle Blowers: Predictors and Effects’ (1986) 71(1) *Journal of Applied Psychology* 137, 141-2; Jessica R Mesmer-Magnus and Chockalingam Viswesvaran, ‘Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation’ (2005) 62(3) *Journal of Business Ethics* 277, 288; Joyce Rothschild and Terence D Miethe, ‘Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption’ (February 1999) 26(1) *Work and Occupations* 107, 120, 122-3; Terry Morehead Dworkin and Melissa S Baucas, ‘Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes’ (September 1998) 17(2) *Journal of Business Ethics* 1281, 1295.

⁴²⁸ AJ Brown and Jane Olsen, ‘Whistleblower mistreatment: identifying the risks’ in AJ Brown (ed), *Whistleblowing in the Australian Public Sector Enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press 2008) 149.

⁴²⁹ Rodney Smith, ‘Whistleblowers and suffering’ in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 242; Terry Morehead Dworkin and Melissa S Baucas, ‘Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes’ (September 1998) 17(2) *Journal of Business Ethics* 1281, 1295.

⁴³⁰ Thirty-five cases were assessed for the purpose of determining the channel within which the complainant made their disclosure as eleven cases were appealed and three cases were the connected cases of ‘Mr A’ and therefore had the same disclosure channel.

⁴³¹ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 38. Only 5% of the employees surveyed stated that they would raise their concern with a TD, Government Minister, or a journalist.

In the UK, Protect has carried out a number of studies that have similar findings to those of the IAW survey and the researcher's analysis of the case law decided under the 2014 Act. In their 2015 report, which presented the findings of its review of ET decisions involving a whistleblowing claim between 2011 and 2013, Protect found that in 90% of the cases, the concern was initially raised internally in the organisation by the whistleblower.⁴³² These findings are supported by the results of the biennial survey carried out by YouGov and commissioned by Protect that examines public attitudes to whistleblowing. The results from the 2011 survey indicate that 85% of respondents said that they would raise a concern about wrongdoing or malpractice with their employer. In 2013, this decreased slightly to 83%.

The data establish that the vast majority of disclosures are being made by workers in the first instance internally. This underscores the success of the incentivised nature of the legislation to promote internal reporting by reflecting the reality that this is the easiest and most common way for concerns to be raised and remedied.

However, there is evidence to suggest that disclosures that are made internally in the first instance are often subsequently made external to the organisation. The researcher assessed that of the 89% (thirty-one) of cases where the disclosure was made internally in the first instance, the worker subsequently made their disclosure externally in 39% (twelve) of those cases. Two of those cases involved multiple external disclosures. In one of those cases, the disclosure was made to the Health and Safety Authority ('HSA'), to the Garda Síochána, and a customer. Whilst in the other case, the disclosure was made to the Child and Family Agency ('Tusla'), the National Youth Council of Ireland, and Dublin/Dun Laoghaire ETB. Therefore, of the external disclosures made, five were made to prescribed persons under s 7 of the 2014 Act;⁴³³ three were made to Ministers under s 8; three were made under s 9, two to a solicitor and one to a trade union representative; and six were made under s 10 to the Garda Síochána, a customer, a family of a service user of a nursing home, Tusla, National Youth Council of Ireland and Dublin/Dun Laoghaire ETB.

⁴³² Protect, 'Is the law protecting whistleblowers? A review of PIDA claims' (Protect 2015) 13. In 2% of the cases, the concern was initially raised with a prescribed person, whilst 2% of the cases involved multiple disclosure recipients, and 6% of the cases concerned disclosures to an 'other'.

⁴³³ In *Monaghan v McGrath Partnership* r-151162-pd-1415R the complainant made her disclosure to HIQA; In *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076 UD 981/2015* the claimant made his disclosure to HIQA; In *An Employee v A Nursing Home* ADJ-00000456 the complainant made her disclosure to HIQA; In *An Employee v An Employer* ADJ-00000258 the complainant made his disclosure to the HSA; In *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC) the applicants made their disclosure to Revenue.

Similarly, in the 2013 collaborative research project carried out by the University of Greenwich and Protect, after each attempt to raise a concern, the incidence of internal reporting reduced, and the rate of external disclosures increased. The research took 1,000 sample calls to Protect's advice line and found that in 849 cases, the concern was raised on the first attempt internally in 91% of the cases, in 7% of the cases the concerns were raised externally, whilst in 2% of the cases, the concern was raised with the Union. In 477 cases, there was a second attempt to raise the concern, and this was raised internally in 73% of these cases, it was raised externally in 23% of the cases, and in 4% of the cases, the concern was raised with the union representative. In 140 cases, the concern was raised a third time, and of those cases, 60% were internal, 36% were external, and again 4% were raised with the Union. In only twenty-one of the cases, the concern was raised a fourth time, and of those cases, 47.6% were internal, matched by 47.6% being raised externally, and 4.8% were raised with the Union.⁴³⁴

The employees in the private and non-profit sectors in Ireland surveyed in the 2016 IAW survey were asked whether a person would be justified in disclosing information about serious wrongdoing to the media or online. In response to this question, only 7% of employees agreed that this disclosure channel was justified as a first option, whilst almost half of the employees surveyed said that this disclosure channel should only be considered as a last resort.⁴³⁵ From the information gathered from the analysis of the case law, this attitude towards disclosures to the media/online is reflected in the fact that no such disclosures were made.

Of those cases where the disclosure was made internally in the first instance, and subsequently made externally, 33% (four) of the cases were successful, which equates to 40% (four) of the overall cases that were successful. Therefore, although the requirements for protection of an external disclosure are much greater than for an internal disclosure, there is evidence that even if made externally from an employer, a disclosure may still be protected.

3.7(c) Why do some workers who have made an internal disclosure, subsequently make an external one?

⁴³⁴ University of Greenwich and Protect, 'Whistleblowing: The Inside Story A study of the experiences of 1,000 whistleblowers' (Protect May 2013) 12.

⁴³⁵ Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 38.

There are a number of potential reasons why a worker, having raised their concern internally, subsequently raises it outside of the organisation. One reason may be that the worker has raised their concern with their employer, but their employer has failed to respond or take action in relation to the disclosure. This occurred in the case *An Employee v A Nursing Home*.⁴³⁶ The complainant herein was a staff nurse employed by the respondent nursing home since 14 March 2015. Within a few weeks of working with the respondent, she became concerned with certain practices that she observed in the workplace. On 2 June 2015, the complainant found a resident ‘tied with a walking belt into an ordinary chair in her room with the door closed and in a very distressed state.’ Immediately, the complainant reported this incident to the Assistant Director of Nursing, completed an incident report in the incident book, and recorded it in the patient file and the Communication Book. Three days later the complainant noticed that her entry in the Communication Book had been removed. She immediately wrote to the Director of Nursing outlining her concerns. The Director of Nursing responded verbally to this letter and informed the complainant that they were aware who was responsible for the incident and that it would be dealt with.

Nonetheless, the complainant received no feedback or details of changes made, nor was her entry in the Communication Book reinstated, causing the complainant serious concerns regarding on-going practice. The complainant continued to raise her concerns regarding certain practices, and in a letter dated 21 September 2015 to the Director of Nursing, she highlighted concerns relating to medication/dangerous drug procedures, training and qualification of certain staff, and the lack of supervision and appraisal of staff. The Director of Nursing replied to this letter but did not address any of the complainant’s concerns. Due to this lack of response and her ongoing concerns, the complainant contacted HIQA, who followed up to these concerns with an unannounced inspection on 30 October 2015. By failing to address the wrongdoing when it was brought to its attention, the respondent left itself open to an external inspection of its facilities thus taking the opportunity to address the wrongdoing out of its own hands.

In some cases, even if an investigation is being pursued, the worker may not believe that their disclosure is being taken seriously or if anything is being done to address their concern due to a lack of feedback. This type of situation is demonstrated in the EAT decision *Carroll*

⁴³⁶ *An Employee v A Nursing Home* ADJ-00000456.

v Congregation of the Holy Spirit T/A Registered Charity Chy 076.⁴³⁷ The claimant herein initially reported an alleged incident of elder abuse by a co-worker to the Matron and Health Care Manager but became concerned that a month or two after having made his disclosure he had not heard anything further in respect of any potential investigation. The claimant gave evidence that when he raised this with the Matron and the Health Care Manager, they suggested to him that it was being dealt with and that he should not concern himself any further. He was also told to ‘mind your own business.’⁴³⁸ The claimant subsequently made his disclosure to HIQA as ‘he felt his original complaint of elder abuse had not been correctly investigated’.⁴³⁹ The Property and Finance Manager of the respondent nursing home gave evidence that an investigation into the allegation of abuse was opened by the respondent.⁴⁴⁰ The EAT stated in its judgment that it ‘fully accepts that the claimant was not given any reason to believe that his original complaint of elder abuse had been taken seriously and was being investigated. There are competing interests at stake here. On the one hand confidentiality and on the other hand a quite reasonable need to know that a complaint has been taken seriously.’⁴⁴¹ This case underscores the importance of providing periodic feedback to a discloser in line with natural justice and fair procedures for the alleged wrongdoer⁴⁴² to reassure the worker that their disclosure is being taken seriously and being investigated.

Another reason why a worker may decide to raise their concern externally from the organisation is if the worker is dissatisfied with the investigation and how it has been conducted. This reason is demonstrated in the decision of *Fingal CC v O’Brien*.⁴⁴³ This case concerned a claim of penalisation by the complainant, a senior official of a local authority, the respondent herein. The complainant raised concerns of disguised payments, accounting irregularities relating to the expenditure of Council monies, and the veracity of statements made by or on behalf of the respondent to members of the Oireachtas in relation to the operation of a high profile sporting project in the area of the respondent. The complainant

⁴³⁷ *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD981/2015.

⁴³⁸ Ciarán D’Arcy, ‘Nursing Home Worker ‘victimised’ after whistleblowing’ *The Irish Times* (Dublin, 20 December 2018) <www.irishtimes.com/news/social-affairs/nursing-home-worker-victimised-after-whistleblowing-1.2913069> accessed 17 September 2018.

⁴³⁹ *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD981/2015.

⁴⁴⁰ Ciarán D’Arcy ‘Nursing home worker ‘upset priests and patients’ with abuse claims’ *The Irish Times* (Dublin, 23 February 2017) <www.irishtimes.com/news/ireland/irish-news/nursing-home-worker-upset-priests-and-patients-with-abuse-claims-1.2986379> accessed 17 September 2018.

⁴⁴¹ *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD981/2015.

⁴⁴² See: Chapter 5 for a discussion of natural justice and fair procedures in the context of protected disclosures.

⁴⁴³ *Fingal CC v O’Brien* PDD 4/2018.

stated that he made his protected disclosures initially by way of letter to the CEO of the respondent on 14 April 2014 and then by way of a detailed report to the CEO on 30 May 2014. The CEO carried out a review of the file and materials furnished to him by the complainant and also commissioned a separate and independent review of the matters raised by the complainant by a retired CEO of a different local authority, Mr John Fitzgerald. In January 2015, the complainant was informed that the matters raised by him had been dealt with in accordance with the relevant proper procedures and that there was nothing further to investigate. Following this, the complainant made a second disclosure in respect of the same issues to the then Minister for the Environment, Community and Local Government, Mr Alan Kelly TD. The evidence at the Labour Court hearing was that this second disclosure was made to the Minister on 23 March 2015 as the complainant ‘was not satisfied with the conclusions arrived at by the respondent’s Chief Executive (or indeed by Mr Fitzgerald) in relation to the issues the complainant had raised in his first protected disclosure.’⁴⁴⁴ At the WRC hearing, the complainant explained that the investigator had never spoken to him and that the respondent had not adequately addressed the contents of the protected disclosures but had instead focussed on a previous disciplinary issue that had been completed some years before and did not relate to the protected disclosures.⁴⁴⁵ It is clear from the evidence proffered by the complainant that the reason why he made a second, external, disclosure was because of his dissatisfaction with the investigation. Both disclosures were accepted by the WRC and the Labour Court to be protected disclosures, but his claim failed, as he did not demonstrate that he had suffered penalisation because of or in retaliation for having made his protected disclosures. This case highlights the necessity to ensure that the investigation is conducted in a proper manner in order to reduce the risk of disclosures of wrongdoing or alleged wrongdoing being made externally from the organisation.

The occurrence of subsequent disclosures being made externally underpins the necessity for organisations to implement Procedures to address disclosures of wrongdoing and to ensure that periodic feedback is given to the worker so that they know that their disclosure is receiving attention.

3.8 Reference to protected disclosures procedures

3.8(a) *Introduction*

⁴⁴⁴ *ibid.*

⁴⁴⁵ *A Senior Official v A Local Authority* ADJ-00001721.

As discussed in detail in Chapter 4, every public body is required to establish and maintain internal Procedures for dealing with protected disclosures made by workers who are, or were, employed by the public body.⁴⁴⁶ Written information in relation to these Procedures must be given by the public body to all workers employed by it.⁴⁴⁷ DPER published guidance (‘DPER Guidance’) for the purpose of assisting public bodies in their establishment and maintenance of the Procedures in March 2016,⁴⁴⁸ and public bodies are required to have regard to this DPER Guidance.⁴⁴⁹

3.8(b) Case law analysis

All forty-eight cases were assessed in order to determine the rate at which Procedures are referenced in case law under the 2014 Act. Twenty-three per cent (eleven) of the cases mentioned Procedures in some manner. All of those cases were WRC cases. Forty-five per cent (five) of these cases were from the public sector, 36% (four) were from the private sector, 10% (one) were from the non-profit sector, and in 10% (one), there was no information as to the relevant sector. Sixty per cent of the cases (seven) concerned internal disclosures, whilst 40% (four) concerned disclosures that were made internally in the first instance and were subsequently made externally. Section 10(3)(e) of the 2014 Act provides that in determining whether it was reasonable for a worker to make a subsequent disclosure of substantially the same information outside of their employer under s 10, regard will be had to whether or not the worker complied with any Procedures authorised by the employer. Thus, it would be expected that a worker would be more likely to be protected in making their wider, public disclosure, if the employer did not have any Procedures, or if the worker had not been made aware of the Procedures, or if it was not reasonable to expect the worker to have used it. Only one of the cases under consideration concerned a s 10 external disclosure, which related to a disclosure to a family member of the service user (discussed below).⁴⁵⁰

⁴⁴⁶ Protected Disclosures Act 2014, s 21(1).

⁴⁴⁷ *ibid* s 21(2).

⁴⁴⁸ *ibid* s 21(3). Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016).

⁴⁴⁹ Protected Disclosures Act 2014, s 21(4).

⁴⁵⁰ *A Worker v A Nursing Home* ADJ-00000267.

In five of the cases, the complainant argued that the respondent had no Procedures.⁴⁵¹ In one of those cases, *A Commercialisation Specialist v A Government Agency*,⁴⁵² the respondent replied that it did have a protected disclosures policy that was dated 2011 and that the complainant was in possession of it as it had been presented to him on 5 May 2017. The WRC did not make reference to the protected disclosures policy issue in its decision but arguably a policy dated 2011 could not be in line with the 2014 Act as it was drafted some three years prior to the enactment of the legislation. Further, as this case concerned a public body, it is troubling that the WRC did not make reference to this issue in its decision due to the obligation under s 21 of the 2014 Act for the public body to establish and maintain Procedures.

In *Training Co-ordinator v A Social Support Service*⁴⁵³ the respondent replied to the claim that it did not have a protected disclosures policy by stating that it did have one and that it was part of their greater Safeguarding policy. The WRC stated in its decision that it was satisfied that the respondent had a clearly defined policy on protected disclosures that made the distinction between a personal grievance and a protected disclosure clear and that in the circumstances the complainant had raised an expression of concern, rather than a relevant wrongdoing.⁴⁵⁴ The WRC put emphasis on the fact that Procedures should make the distinction between a personal grievance and a protected disclosure clear and the fact that the respondent had done so, in this case, seemed to carry weight in the WRC's determination against the complainant.

In *A Senior Official v A Local Authority*⁴⁵⁵ the complainant argued that the respondent did not take its responsibilities under the 2014 Act seriously and that 'it was not irrelevant that the respondent's policy was defective.' In substantiating this claim, he submitted that the person who was named as the recipient of protected disclosures was no longer working for the respondent and that 'This blasé attitude was reflected in the respondent's approach to penalisation.' The WRC noted this defect in its decision stating that 'It is obvious that the respondent should update its policy and procedure regarding protected disclosures; this does not, however, mean that such a complaint should automatically succeed.' Again, as this case

⁴⁵¹ *Training Co-ordinator v A Social Support Service* ADJ-00002320; *A Worker v A Service Station* ADJ-00006640; *A Commercialisation Specialist v A Government Agency* ADJ-00007228; the connected cases of *Mr A v A Public Body* ADJ-00006360 and *Mr A(1) v A Government Department* ADJ-00006381.

⁴⁵² *A Commercialisation Specialist v A Government Agency* ADJ-00007228.

⁴⁵³ *Training Co-ordinator v A Social Support Service* ADJ-00002320.

⁴⁵⁴ *ibid.*

⁴⁵⁵ *A Senior Official v A Local Authority* ADJ-00001721.

concerned a public body, it is troubling that the WRC did not put more weight on the failure of the respondent to comply with its obligations under s 21 of the 2014 Act. This decision reflects the pattern emanating from the WRC that seems to favour the respondent when it comes to the impact of the existence or non-existence of Procedures. In this case, having a defective policy did not work to the complainant's advantage, but in two other decisions of the WRC, a failure by the complainant to use the respondent's Procedures worked against them. For example, in *Employee v Employer*⁴⁵⁶ the Adjudication Officer declared that the complaint was not well founded in circumstances where she failed to present evidence that she had been penalised by the respondent following the issuing of a solicitor's letter dated 7 April 2016. In making this determination, the Adjudication Officer took into consideration that the respondent had a protected disclosures policy that had been furnished to the complainant and that the complainant had not used this policy when making her alleged protected disclosures. The Adjudication Officer stated in this regard that:

I note that the Respondent has a Whistleblowing Policy in the Employee Handbook which was circulated to all employees in March 2016. This is a comprehensive Policy Document and provides that complaints should be addressed in writing to the Chairman of the Board of Directors of the Respondent Company. The Complainant did not utilise this Policy and she did not make a complaint until her Solicitor wrote to the Respondent Company on the 7th April 2016.

What is striking about this decision is that the Adjudication Officer focussed on the fact that the disclosure was not made 'in writing', as per the respondent's Whistleblowing Policy, even though this is not a legislative requirement.

Further, in *A Worker v A Nursing Home*,⁴⁵⁷ the respondent had argued that the complainant's disclosure was not a protected disclosure because it was 'not made in accordance with the hospital policy and not made to the correct person. His contract requires him to report the matter to the nurse in charge formally and he failed to do so. The Director of Nursing denied that he had ever reported the matter to her.' In finding that the complainant had no justification to ground his claim of constructive dismissal the Adjudication Officer stated 'I note also that he failed to use the company grievance procedures at any stage which is also damaging to his complaint.' The WRC appears to have applied s 10(3)(e) of the 2014 Act to this decision but may not have consciously done so as there was no reference to this provision in the decision. Also, the Adjudication Officer refers to the 'grievance procedures', but it is

⁴⁵⁶ *Employee v Employer* ADJ-00003371.

⁴⁵⁷ *A Worker v A Nursing Home* ADJ-00000267.

assumed this is in reference to the ‘hospital policy’ referred to by the respondent in its submission.

However, in *A Worker v A Communications Provider*⁴⁵⁸ the respondent had argued that the company handbook sets out a procedure for whistleblowing and that the complainant had failed to observe same by drawing his concerns to the attention of the Managing Director. Nonetheless, the WRC did not consider this or reference it at all in its decision when it found in favour of the complainant that the decision to dismiss him was mainly related to him having made a protected disclosure regarding the respondent’s failure to observe best practice on health and safety matters.

The issue of Procedures was mentioned in a small number of cases. Arguably, only two cases turned on this issue, in that the fact that a disclosure was not made in line with Procedures was taken into consideration in determining that a protected disclosure was not made. It is of concern that in two of the cases where there was evidence of non-compliance by a public body with its obligations under s 21 of the 2014 Act, the WRC did not put any weight on this. This raises questions as to the value of s 21 from a litigation perspective.

3.9 Win/lose

3.9(a) Introduction

An assessment was undertaken of the number of cases under the 2014 Act that were successful and unsuccessful. It was ascertained, that taking all forty-eight decisions together, 79% (thirty-eight) of the cases were unsuccessful and only 21% (ten) of the cases were successful. This finding can be contrasted with the position in the UK where 12% of the judgments handed down in 2011-13 were successful on PIDA grounds, whilst 62% of the cases were lost or struck out.⁴⁵⁹ Although this is arguably a low success rate for claimants in Ireland, and even lower again in the UK, a study carried out in the US of Department of Labor Sarbanes-Oxley determinations between 2002-05 found that at Occupational Safety and Health Administration (‘OSHA’) level only 3.6% of employees were successful, and only 6.5% were successful on appeal before administrative law judges (‘ALJs’).⁴⁶⁰

⁴⁵⁸ *A Worker v A Communications Provider* ADJ-00001380.

⁴⁵⁹ Protect, ‘Whistleblowing: Time for Change, A 5 year review by Public Concern at Work’ (Protect July 2016) 28. This is the most recent data available on this issue.

⁴⁶⁰ Richard E Moberly, ‘Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win’ (2007) 49 William and Mary Law Review 65, 91. Moberly identified three

Of the unsuccessful cases under the 2014 Act, 66% (twenty-five) of the cases were lost on the merits/facts of the case, whilst 34% (thirteen) of the unsuccessful cases were lost due to procedural issues.

Fifty-six per cent (ten) of the penalisation cases were unsuccessful on the merits, whilst 33% (six) of the penalisation cases were unsuccessful on procedural grounds. Eleven per cent (two) of the penalisation cases were successful.

Fifty-six per cent (eight) of the unfair dismissal cases were unsuccessful on the merits, whilst 13% (two) were unsuccessful on procedural grounds. Thirty-one per cent (five) of the unfair dismissal claims were successful.

Ninety-two per cent (eleven) of the cases before the Labour Court were unsuccessful, whilst 77% (twenty-four) of the cases before the WRC were unsuccessful. Of the unsuccessful cases before the Labour Court, 45% (five) were unsuccessful on the merits, whilst 55% (six) were unsuccessful on procedural grounds. Of the unsuccessful cases before the WRC, 75% (eighteen) were unsuccessful on the merits, whilst 25% (six) were unsuccessful on procedural grounds.

Of the interim relief applications before the Circuit Court, two out of three interim relief applications were successful. This finding is in contrast to the position in the UK where only 7% of interim relief applications were successful.⁴⁶¹

The ‘Statutory Review of the Protected Disclosures Act 2014’ (‘DPER Statutory Review’) commenced by DPER under s 2 of the 2014 Act in August 2017 and published 11 July 2018, stated in relation to its analysis of WRC cases that:

The findings from the WRC show that in some cases whistleblowers were successful and in others they were not, which indicates that the Act is working as it should. The Courts are only beginning to interpret the Act and some landmark cases have been noted above. Notwithstanding these first broadly positive results, it is clear that further work needs to be done to increase awareness levels of the Act both amongst employees and employers.⁴⁶²

The researcher’s findings cast doubt over the position adopted in the DPER Statutory Review. Firstly, the statement ‘The findings from the WRC show that in some cases

rationales for the high rate of unsuccessful employee claims: (i) procedural; (ii) boundary; and (iii) causation. *ibid* 100-06.

⁴⁶¹ Protect, ‘Is the law protecting whistleblowers? A review of PIDA claims’ (Protect 2015) 4.

⁴⁶² Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 22-23.

whistleblowers were successful and in others they were not’ is not reflected in the findings of the thirty-one decisions of the WRC between 15 July 2014 and 16 July 2018 where only 23% (seven) of the claims were successful. Secondly, the statement ‘Notwithstanding these first broadly positive results’ is misleading as the DPER Statutory Review only referenced four successful cases⁴⁶³ and two unsuccessful cases.⁴⁶⁴ The first successful case was not until July 2016,⁴⁶⁵ some two years after the enactment of the 2014 Act, and taking into consideration that 79% (thirty-eight) of all of the cases under the 2014 Act have been unsuccessful it is very difficult to accept that the results of the case law have been ‘broadly positive’. Even if this had not been the case and the analysis of the case law by DPER was correct, it is too simplistic a conclusion that the 2014 Act is, therefore ‘working as it should’. Clearly, the high rate of unsuccessful cases under the 2014 Act raises concerns as to the efficacy of the 2014 Act in protecting workers who raise concerns about wrongdoing in the workplace.

3.9(b) Why is there a high rate of unsuccessful claims under the 2014 Act?

There are a number of potential reasons why so many workers are unsuccessful in their claims. It could be because: (i) the claims have been brought frivolously/maliciously by the complainants;⁴⁶⁶ (ii) the legal advisors of the complainants do not understand the application/scope of the provisions of the 2014 Act, or the complainants who do not have representation misunderstand the application/scope of the 2014 Act; or (iii) the 2014 Act has been misapplied by the Adjudication Officers/members of the Labour Court.

Looking at the third hypothesis, the question arises whether the Adjudication Officers in the WRC or the members of the Labour Court are applying the 2014 Act correctly. Arguably this should not be the case as when the WRC was established, the researcher provided training on the 2014 Act to the newly appointed Adjudication Officers in February 2015 and again in March 2017 to the second intake of Adjudication Officers as part of their training course. Nonetheless, the training was only one and a half hours long, which is arguably not

⁴⁶³ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC); *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC); *An Employee v A Public Body* ADJ-00005583; *An Employee v A Nursing Home* ADJ-00000456.

⁴⁶⁴ *Donegal CC v Carr* [2017] 28 ELR 259 (LC); *Employee v Employer* ADJ-00003371.

⁴⁶⁵ *Donegal CC v Carr* [2017] 28 ELR 259 (LC).

⁴⁶⁶ The Irish Small and Medium Enterprise Association (Isme) claimed that some employment lawyers might be coaching clients to exploit the 2014 Act. Mark Paul and Peter Hamilton, ‘Lawyers ‘coaching’ clients to exploit whistleblower laws – Isme’ *The Irish Times* (Dublin, 10 August 2018) <www.irishtimes.com/business/economy/lawyers-coaching-clients-to-exploit-whistleblower-laws-isme-1.3182965> accessed 9 October 2018.

substantial enough to understand the application of the 2014 Act in a comprehensive manner. Further, it only applied to the new intake of Adjudication Officers and not to those who were previously appointed as such. There is no similar pre-appointment training programme for members of the Labour Court. There is a structured CPD programme for current members of the Labour Court. However, the Labour Court does not have a budget to pay for external contributors, and therefore the training is usually delivered by the Registrar or the Deputy Chairman of the Labour Court.

The Whistleblowing Commission in the UK recommended in 2013 that tribunal members hearing PIDA cases should have specialist training.⁴⁶⁷ This recommendation was based on the fact that judges who have received training in discrimination and equal pay cases are ‘ticketed’ to deal with the more complex discrimination cases.⁴⁶⁸ In Serbia, the Law on the Protection of Whistleblowers Act, no 128/2014 requires that judges hearing whistleblowing cases must have specialist knowledge in the protection of whistleblowers, which is to be conducted by the Judicial Academy in cooperation with the Ministry competent for judicial affairs.⁴⁶⁹ According to the Supreme Court of Cassation, in the three years, post-adoption of the Serbian whistleblowing law on 25 November 2014, 1,100 judges, and about 200 office technical advisers had so far received specific training.⁴⁷⁰ However, despite this training, in the first in-depth review of Serbia’s whistleblowing law, undertaken by the Center for Investigative Journalism of Serbia (‘CINS’), it was discovered that there had been an inconsistent approach adopted by different judges in cases with similar facts.⁴⁷¹ CINS stated in that regard that:

The judges dealing with these cases have gone through special training, but the practice of decision-making has been inconsistent. Among other things, some courts have refused to provide a temporary measure for protection, citing for example that the connection between the dismissal and reporting of irregularities was not proven.

⁴⁶⁷ Protect, ‘The Whistleblowing Commission, The report of the Whistleblowing Commission on the effectiveness of existing arrangements for workplace whistleblowing in the UK’ (Protect November 2013) Recommendation 21.

⁴⁶⁸ *ibid* 24.

⁴⁶⁹ Law on the Protection of Whistleblowers Act, no 2014/128, art 25.

⁴⁷⁰ Osservatorio Balcani e Caucaso Transeuropa, ‘Whistleblowers in Serbia: a model law’ (*Osservatorio Balcani e Caucaso Transeuropa*, 21 December 2017) <www.balcanicaucaso.org/eng/Areas/Serbia/Whistleblowers-in-Serbia-a-model-law-184197> accessed 1 October 2018.

⁴⁷¹ Center for Investigative Journalism of Serbia, ‘Safe and Sound? Jury still out on Serbia’s whistleblower protection law’ (*Center for Investigative Journalism of Serbia*, 23 January 2018) <www.cins.rs/english/research_stories/article/safe-and-sound-jury-still-out-on-serbias-whistleblower-protection-law> accessed 1 October 2018; see also: Blueprint for Free Speech, ‘Safe or Sorry: Whistleblower Protection Laws in Europe Deliver Mixed Results’ (Blueprint for Free Speech 2018) 15.

Appellate courts often change decisions of the first instance, when appeal is submitted.

Thus, although training is a welcome tool in the implementation of whistleblowing law, it is only with time and experience of applying the law that proper application is assured.

In Ireland, there have to date been a number of decisions that have arguably been made erroneously. For example, in *Monaghan v McGrath Partnership*⁴⁷² the Rights Commissioner⁴⁷³ held that there was no credible evidence that the respondent was responsible for any alleged alienation, but strikingly, the Rights Commissioner stated that ‘In addition I note that alienation is not on the list of penalisation as contained in the Act.’ As discussed above in the ‘Type of claim’ section, the definition of penalisation under s 3(1) of the 2014 Act is a non-exhaustive list, and the Rights Commissioner was not limited to the acts or omissions specifically included in the definition of ‘penalisation’ under the 2014 Act. Also, in *Carr v Donegal CC*⁴⁷⁴ the Rights Commissioner/Adjudication Officer interpreted s 5(3)(b) of the 2014 Act incorrectly in refusing to uphold the complainant’s complaint on the basis that the matters raised by him were ‘inextricably linked to the contracts of employment of the individuals against whom the complaints of penalisation have been made and accordingly find that they do not fall within the definition of a relevant wrongdoing.’ Section 5(3)(b) excludes a legal obligation that arises under ‘the *worker’s* contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services’⁴⁷⁵ and does not exclude a matter relating to another worker’s contract of employment.

Further, despite the inclusion of s 23 in the 2014 Act that any provision in an agreement that intends to prohibit or restrict the making of a protected disclosure or exclude or limit the operation of any provision of the 2014 Act is void,⁴⁷⁶ the EAT in *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076*⁴⁷⁷ referred to a non-disclosure clause in its decision. The EAT stated that ‘On balance the Tribunal would have to accept that even in the clear absence of a non-disclosure clause in an acknowledged contract of employment, the claimant, along with any co-employee knew or ought to have known that matters as sensitive as care of the elderly and vulnerable should not be discussed other than in an

⁴⁷² *Monaghan v McGrath Partnership* r-151162-pd-1415R.

⁴⁷³ Note that Rights Commissioners did not receive training on Protected Disclosures Act 2014.

⁴⁷⁴ *Carr v Donegal CC* r-153749-pd-14.

⁴⁷⁵ Protected Disclosures Act 2014, s 5(3)(b) (emphasis added).

⁴⁷⁶ *ibid* s 23(a)-(b).

⁴⁷⁷ *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD 981/2015.

appropriate and confidential way.’ Also, in *A Fire Station Officer (retired) v A Local Authority*⁴⁷⁸ the Adjudication Officer incorrectly interpreted the time limits for considering the contravention to which the complaint relates and held that the ‘workplace practices’ that were the subject of the disclosure and the alleged penalisation were not made in time and therefore he did not have jurisdiction to hear the complaint. However, as discussed in the ‘Type of claim’ section, the time limits do not apply to the disclosure and the 2014 Act can retrospectively apply to the disclosure based on s 5(1) of the 2014 Act. Moreover, in *A Commercialisation Specialist v A Government Agency*⁴⁷⁹ the Adjudication Officer stated that the disclosure to a Minister was a disclosure under s 10 of the 2014 Act (even though it is a s 8 disclosure) and then stated that ‘I cannot establish that this document constituted a Protected Disclosure either as it is interwoven with a request for a job evaluation to be undertaken and the purpose of protected disclosure out laws a pursuance for personal gain.’ This finding is incorrect. Section 5(7) of the 2014 Act provides that the motivation is irrelevant to whether a disclosure is a protected disclosure. The issue of ‘personal gain’ is one of a number of factors that is taken into consideration in a s 10 disclosure and not a s 8 disclosure under the 2014 Act.

With respect to the Labour Court, in *AIB v Murphy*,⁴⁸⁰ discussed in the ‘Type of claim’ section, the Labour Court interpreted the six-month time limit for the initiation of claims under the 2014 Act incorrectly where it was held that the alleged protected disclosure was relevant to the cognisable period, instead of the alleged penalisation, and therefore refused jurisdiction. Also, the decision of the Labour Court in *Donegal CC v Carr*,⁴⁸¹ which was decided by the Chairman of the Labour Court, Mr Kevin Foley, is arguably erroneous. This case was an appeal before the Labour Court against a decision by the Rights Commissioner that a worker, the complainant, had not made a protected disclosure as the information disclosed did not constitute a ‘relevant wrongdoing’.

The complainant herein had been employed by the respondent since March 1985 and was still employed by the respondent at the time of the appeal hearing. At all material times, the complainant was employed by the respondent as a Station Officer in the Retained Fire Service. The complainant alleged that he had made six separate protected disclosures to his line managers in the Retained Fire Service. He submitted that four of the six disclosures

⁴⁷⁸ *A Fire Station Officer (retired) v A Local Authority* ADJ-00004684.

⁴⁷⁹ *A Commercialisation Specialist v A Government Agency* ADJ-00007228.

⁴⁸⁰ *AIB v Murphy* PDD 1/2018.

⁴⁸¹ *Donegal CC v Carr* [2017] 28 ELR 259 (LC).

consisted of complaints made to service management in relation to alleged behaviour of firefighters in the station in which he was the Station Officer, the fifth disclosure was in the form of a reply by him to a question from a manager in relation to a work payment claim, and the sixth disclosure was a complaint made by him regarding the fitness of two firefighters to carry out their duties by reason of physical capacity issues.

The Labour Court was tasked with determining first whether the complainant had made a protected disclosure and second, if a protected disclosure had been made by him, whether he had been subjected to penalisation for having made that protected disclosure.⁴⁸² The Labour Court proceeded to consider the capacity within which the complainant made his disclosures. The Labour Court noted that the complainant had asserted that he had made his disclosures ‘by way of complaints to his managers in the service in the discharge of his role as a Manager/Supervisor of firefighters.’⁴⁸³ The Labour Court put an emphasis on the fact that one of the disclosures had been made using a standard form drawn up for the purpose of reporting issues within the Fire Service. Taking those factors into consideration, the Labour Court held that there could be no doubt that the disclosures made by the complainant to his managers were made by him pursuant to the discharge of his duties as a Station Officer.⁴⁸⁴ In light of the above, the Labour Court proceeded to consider s 5(5) of the 2014 Act which provides that ‘A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker’s employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.’⁴⁸⁵ Having considered this section, the Labour Court found that the disclosures made by the complainant were not protected disclosures within the meaning of the 2014 Act and held that:

The complaints which are alleged to be protected disclosures in the within case (a) could not reasonably be argued to be outside of the function of a Station Officer in the Fire Service to detect, and (b) relate to matters other than an alleged omission of the Employer. On a plain reading of the Act therefore the Court finds that the complaint made by the Appellant in this case is misconceived. The complaints made by the Appellant in pursuance of his duties as Station Officer were not Protected Disclosures within the meaning of the Act.⁴⁸⁶

Once the Labour Court determined that the disclosures were not protected disclosures, the Labour Court concluded that there was no requirement to consider whether the acts as

⁴⁸² *ibid* 261.

⁴⁸³ *ibid* 262.

⁴⁸⁴ *ibid*.

⁴⁸⁵ Protected Disclosures Act 2014, s 5(5).

⁴⁸⁶ *Donegal CC v Carr* [2017] 28 ELR 259 (LC) 262-63.

alleged constituted penalisation for the purposes of the 2014 Act. The Labour Court affirmed the decision of the Rights Commissioner on the basis that no protected disclosure had been made by the complainant.⁴⁸⁷

This case is important as that it addressed the scope of s 5(5) of the 2014 Act. The Labour Court applied a plain reading of that section and found that it was the function of the worker to make the disclosures that he made. In that regard, the Labour Court found that it was the function of the complainant as Station Officer to detect the alleged wrongdoings and that these wrongdoings did not consist or involve an omission on the part of the employer. The application of s 5(5) in this manner is worrisome as it means that the scope of the protection under the 2014 Act excludes a wide range of workers who are employed in managerial positions. Applying the rationale of the Labour Court in this case generally, it would mean that workers who are in positions where they are responsible for the running of the organisation would fail to attract the protections of the 2014 Act in circumstances where their roles are deemed to consist of an obligation to detect wrongdoing in the workplace, unless the wrongdoing consisted of or involved an act or omission on the part of their employer.

It is arguable that the Labour Court should have taken a purposive approach in interpreting s 5(5) of the 2014 Act. Section 5 of the Interpretation Act 2005 provides that if in construing a provision of any Act that on a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas the provision must be given a construction that reflects the plain intention of the Oireachtas where that intention can be ascertained from the 2014 Act as a whole.⁴⁸⁸ Therefore, in ascertaining the intention of the Oireachtas, the preamble of the 2014 Act provides that the 2014 Act is ‘An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.’⁴⁸⁹ Thus, the purpose of the 2014 Act is to protect workers who make protected disclosures and the Labour Court should not have taken the approach that it did in limiting the range of workers to whom protection can be afforded as this would mean that a wide range of workers are not protected from action being taken against them as a result of having made a protected disclosure.

⁴⁸⁷ *ibid* 263.

⁴⁸⁸ Interpretation Act 2005, s 5(1).

⁴⁸⁹ Protected Disclosures Act 2014.

This decision was cited in the Adjudication Officers' decisions of *Training Co-ordinator v A Social Support Service*⁴⁹⁰ and *A Public Servant v A Government Department*.⁴⁹¹

These erroneous decisions, outlined above, shed light on the confusion experienced by some Adjudication Officers and Labour Court members in applying the 2014 Act to the cases before them. They underscore the necessity of training, especially for members of the Labour Court, as this has sole appellate jurisdiction in all disputes under employment rights legislation and it is, therefore, paramount that it is interpreting and applying the law correctly.

3.10 Remedy and quantum

3.10(a) Introduction

The nature of the remedy ordered in a claim under the 2014 Act depends on the type of the claim that is initiated by the complainant.

3.10(a)(i) Unfair dismissal

In s 11 unfair dismissal claims, the employee, if successful, is entitled to redress that is considered appropriate in all the circumstances by the WRC, the Labour Court, or the Circuit Court.⁴⁹² The redress ordered can consist of re-instatement,⁴⁹³ re-engagement,⁴⁹⁴ or compensation.⁴⁹⁵ Normally, for an unfair dismissal claim, an employee is entitled to be awarded up to 104 weeks' remuneration (ie two years' remuneration),⁴⁹⁶ however, an employee who was dismissed wholly or mainly for having made a protected disclosure is entitled to be awarded up to 260 weeks' remuneration (ie five years' remuneration). Remuneration includes allowances in the nature of pay and benefits in lieu of or in addition to pay.⁴⁹⁷ At the second stage of the Protected Disclosures Bill 2013, former Minister Brendan Howlin ('Howlin') explained in relation to this increase that:

This legislation provides for compensation of up to five times one's annual salary in such cases. Some of the employers' bodies have suggested that this could be too

⁴⁹⁰ *Training Co-ordinator v A Social Support Service* ADJ-00002320.

⁴⁹¹ *A Public Servant v A Government Department* ADJ-00004925.

⁴⁹² Unfair Dismissals Act 1977, s 7(1).

⁴⁹³ *ibid* s 7(1)(a).

⁴⁹⁴ *ibid* s 7(1)(b).

⁴⁹⁵ *ibid* s 7(1A), as inserted by Protected Disclosures Act 2014, s 11(1)(d). Such compensation must be calculated in accordance with Unfair Dismissals (Calculation of Weekly Remuneration) Regulations 1977, SI 1977/287.

⁴⁹⁶ *ibid* s 7(1)(c).

⁴⁹⁷ *ibid* s 7(3).

severe for small organisations and that we should instead go along with just twice the salary as contained in the unfair dismissal provisions. I do not go along with that because twice a salary is nothing to a large bank or financial institution. In fact, it would pay five times the whistleblower's salary to get rid of the nuisance.⁴⁹⁸

Compensation consists of any financial loss incurred that is attributable to the dismissal and includes any actual loss and any estimated prospective loss of income and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts, 1967 to 1973, or in relation to superannuation.⁴⁹⁹ If the employee does not incur any financial loss, then the employer may have to pay compensation up to four weeks' remuneration as is just and equitable having regard to all the circumstances.⁵⁰⁰ The compensation awarded can be reduced by up to 25% if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.⁵⁰¹

The Joint Committee on Finance, Public Expenditure and Reform noted that given the potential loss of career and livelihood, setting the maximum at two years' remuneration could serve as a deterrent to prospective disclosures.⁵⁰² Although there was some resistance from employers to the increase of compensation for unfair dismissal for making a protected disclosure, as expressed by Howlin above, the fact that the compensation is limited is disquieting.⁵⁰³ By contrast, in the UK, there is no cap on the amount of compensation that can be awarded to employees who are dismissed where the reason or principal reason is that he or she made a protected disclosure.⁵⁰⁴ It is arguable that the position in the UK is much more robust than the Irish position and is more in line with international best practice principles. Transparency International recommends that a full range of remedies should be

⁴⁹⁸ Seanad Deb 4 February 2014, vol 829.

⁴⁹⁹ Unfair Dismissals Act 1977, s 7(3). In the UK, loss of earnings in a detriment claim under PIDA can include an award of damages for so-called 'stigma loss' if the claimant suffers any disadvantage on the labour market, not only because they were dismissed by their employer, but also because of the circumstances in which they were dismissed and because they initiated proceedings against that employer. *Small v The Shrewsbury and Telford Hospital NHS Trust* [2017] EWCA Civ 882.

⁵⁰⁰ Unfair Dismissals Act 1977, s 7(1)(c) as amended.

⁵⁰¹ *ibid* s 7(2B), as inserted by Protected Disclosures Act 2014, s 11(1)(e). This reflects the position in the UK under Enterprise and Regulatory Reform Act 2013, s 18(5), which inserts s 123(6A) into Employment Rights Act 1996.

⁵⁰² Joint Committee on Finance, Public Expenditure and Reform, *Report on hearings in relation to the Scheme of the Protected Disclosures in the Public Interest Bill, 2012* (31/FPER/010, 2012) 10.

⁵⁰³ Protected Disclosures Act 2014, sch 2, s 1(3)(c), provides that compensation for acts of penalisation against an employee for having made a protected disclosure is also limited to five years' remuneration. Such compensation must be calculated in accordance with the Unfair Dismissals (Calculation of Weekly Remuneration) Regulations 1977, SI 287/1977.

⁵⁰⁴ Employment Rights Act 1996, s 137(1).

available for persons who suffer repercussions for having made a protected disclosure, stating that a ‘full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole’ and includes compensation for lost past, present and future earnings, and status.⁵⁰⁵ Further, the Mahon Tribunal recommended in its Final Report that limits on the amount of compensation that may be awarded to a whistleblower be removed.⁵⁰⁶ The 2014 Act should have adopted such recommendations and provided for uncapped compensation just as the UK legislation did. There is evidence in Ireland of persons who have made disclosures of wrongdoing being unable to secure employment in the same area of employment ever again.⁵⁰⁷ As a result, such persons need to be compensated appropriately and a limitation on the amount of compensation that can be awarded will mean that this is not achieved.

3.10(a)(ii) *Interim relief*

In an interim relief application, the Circuit Court must announce its findings and explain to both parties, if present, what powers the court may exercise on the application and in what circumstances it will exercise them.⁵⁰⁸ If the employer and the employee are willing to agree, the court may order that, pending the determination or the settlement, the employee is reinstated⁵⁰⁹ in the position that he or she was dismissed from or order that the employee is

⁵⁰⁵ Transparency International, ‘International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest’ (TI 2013) 9.

⁵⁰⁶ Tribunal of Inquiry into Certain Planning Matters and Payments, *Final Report* (2012) 2531. Frank Dunlop and James Gogarty blew the whistle on corruption in the planning process from the late 1980s to the late 1990s which resulted in the establishment of the Flood/Mahon Tribunal. Full report is available at: <www.flood-tribunal.ie/asp/Reports.asp?ObjectID=310&Mode=0&RecordID=50> accessed 10 October 2018.

⁵⁰⁷ Internal auditor, Eugene McErlean, was unable to secure work as an auditor again after having been removed from his position by AIB in 2002 at the same time as having made disclosures to the Financial Regulator about overcharging of customers by the Bank. In 2011, McErlean was appointed to the Citizens Information Board. Department of Employment Affairs and Social Protection, ‘Minister Burton announces appointment of Eugene McErlean to Citizens Information Board’ (*Department of Employment Affairs and Social Protection*, 12 September 2011) <www.welfare.ie/en/pressoffice/Pages/Minister-Burton-announces-appointment-of-Eugene-McErlean-to.aspx> accessed 16 March 2019. Further, Olivia Greene, a former home loan supervisor for Irish Nationwide Building Society, had also been unable to find employment since making disclosures about alleged mismanagement at the Building Society in 2009. Greene states that ‘I have sent out 60 or more applications for jobs but all have been refused even the ones which I am well qualified for. I am totally unemployable in financial services now.’ Jamie Smyth, ‘Ireland’s lonely whistleblowers’ *Financial Times* (Dublin, 25 November 2013) <www.ft.com/content/e5c1cf4e-4876-11e3-a3ef-00144feabdc0> accessed 10 October 2018; See also: Claire McCormack, ‘Nationwide whistleblower couple fight to keep home’ *Sunday Independent* (Dublin, 19 April 2015) <www.independent.ie/business/personal-finance/property-mortgages/nationwide-whistleblower-couple-fight-to-keep-home-31153711.html> accessed 10 October 2018.

⁵⁰⁸ Protected Disclosures Act 2014, sch 1, s 2(2).

⁵⁰⁹ *ibid* sch 1, s 2(3)(a) provides that in reinstating the employee, the employer must treat the employee in all respects as if the employee had not been dismissed.

re-engaged in another position on terms and conditions not less favourable⁵¹⁰ than those which would have been applicable to the employee if he or she had not been dismissed.⁵¹¹ If the employer specifies terms and conditions for re-engagement and the employee rejects these on reasonable grounds, the court must do one of two things: (i) make an order for the continuation of the employee's contract of employment from the date of its termination⁵¹² until the determination or the settlement of the claim, for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and also for the purposes of determining the period of reckonable employment;⁵¹³ or (ii) make no order.⁵¹⁴ If on hearing the application for interim relief the employer fails to attend before the court or states an unwillingness either to reinstate or re-engage the employee the court must make an order for the continuation of the employee's contract of employment⁵¹⁵ until the determination or the settlement of the claim, for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and also for the purposes of determining the period of reckonable employment.⁵¹⁶

3.10(a)(iii) *Penalisation exclusive of unfair dismissal*

For a s 12 penalisation claim, a decision of the Adjudication Officer will do one or more of the following: (i) declare that the complaint was or was not well founded;⁵¹⁷ (ii) require the employer to take a specified course of action;⁵¹⁸ and/or (iii) require the employer to pay compensation as is just and equitable having regard to all the circumstances up to a maximum of five years' remuneration.⁵¹⁹ The compensation awarded can be reduced by up to 25% if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.⁵²⁰ On appeal, the Labour Court shall 'make a determination in

⁵¹⁰ *ibid* sch 1, s 2(4) provides that the phrase 'terms and conditions not less favourable than those which would have been applicable to the employee if the employee had not been dismissed' means, as regards seniority, pension rights, and other similar rights, that the period before the dismissal should be regarded as continuous with the employee's employment following the dismissal.

⁵¹¹ *ibid* sch 1, ss 2(3) and 2(5)-2(7).

⁵¹² *ibid* sch 1, s 2(8).

⁵¹³ *ibid* sch 1, s 3(1).

⁵¹⁴ *ibid* sch 1, s 2(8).

⁵¹⁵ *ibid* sch 1, s 2(9).

⁵¹⁶ *ibid* sch 1, s 3(1).

⁵¹⁷ *ibid* sch 2, s 1(3)(a).

⁵¹⁸ *ibid* sch 2, s 1(3)(b).

⁵¹⁹ *ibid* sch 2, s 1(3)(c). Such compensation must be calculated in accordance with Unfair Dismissals (Calculation of Weekly Remuneration) Regulations 1977, SI 287/1977.

⁵²⁰ *ibid* sch 2, s 1(4).

writing in relation to the appeal affirming, varying, or setting aside the decision’ of the Adjudication Officer.⁵²¹

3.10(a)(iv) *Tort claim under s 13 of the 2014 Act*

As referred to in the ‘Forum’ section, in a s 13 tort claim, a successful plaintiff can be awarded damages that are limited by the monetary jurisdiction of the particular court wherein the claim is brought. A court may order a range of different types of damages, ie nominal, contemptuous, special and general, compensatory, restitutionary, exemplary damages, and/or aggravated. Damages are paid as a lump sum award. In comparison to an unfair dismissal claim where only financial loss can be awarded, or a penalisation claim that, like an unfair dismissal claim, is capped at five years’ remuneration, a claim under s 13 could mean that a worker might be awarded compensation for both pecuniary and non-pecuniary loss that is not capped (except for the monetary jurisdiction of the particular court, thus a claim before the High Court would not be capped). So for example, a claim before the High Court may result in a very high award of compensation if there has been a particularly egregious infringement of a plaintiff’s rights.⁵²² Further, there is no requirement under s 13 for compensation to be reduced by 25% if the investigation of the relevant wrongdoing concerned was not the sole or main motivation for making the disclosure by the worker, as is required in a claim for redress for unfair dismissal under s 11 or for penalisation under s 12. Nonetheless, a court could exercise its discretion in this regard when making an award of compensation.

3.10(b) *Case law analysis*

As mentioned earlier, there have been ten successful claims under the 2014 Act. Three concerned penalisation claims, five concerned unfair dismissal claims, whilst two were

⁵²¹ *ibid* sch 2, s 2(1)(b).

⁵²² In *Shortt v Commissioner of An Garda Síochána* [2005] IEHC 311, the High Court made an award of €50,000 in exemplary damages to the plaintiff who had been framed by members of the Garda Síochána for drug offences in relation to a night club that he was the owner and which had resulted in the imposition of a three-year sentence of imprisonment. In *Shortt v Commissioner of An Garda Síochána* [2007] 4 IR 587 (SC), the Supreme Court increased the High Court award to €1 million. It is worth noting that in relation to exemplary damages, several judges in Ireland have expressed the view that the *Rookes v Barnard* [1964] AC 1129 (HL) limitations do not apply to Irish law, ie Keane CJ in *O’Brien v Mirror Group Newspapers Ltd* [2001] 1 IR 1 (SC) 22; Murray CJ in *Shortt v Commissioner of An Garda Síochána* [2007] 4 IR 587 (SC) 620; Finlay CJ in *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 (SC). The *Rookes* limitations require that exemplary damages can only be awarded in three categories of cases: (i) The oppressive, arbitrary or unconstitutional action by the servants of government; (ii) where the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and (iii) where exemplary damages were expressly authorised by statute. *Rookes v Barnard* [1964] AC 1129 (HL) 1226-1227.

interim relief applications. Only one of the successful claims, a penalisation claim, was successful before the Labour Court.

Excluding the interim relief applications, which will be dealt with below, the remedies ordered all consisted of orders of compensation, whilst one case, in addition to an order for compensation, included an order for the respondent to remove the complainant's disciplinary sanction from his file.⁵²³

3.10(b)(i) *Unfair dismissal case law remedies*

In the successful unfair dismissal claims, the WRC ordered a range of monetary awards to be made. The largest award made occurred in the case of *An Employee v A Nursing Home*⁵²⁴ where the WRC ordered compensation to be paid to the complainant in the amount of €52,416, which equated to two years' salary. In making its determination, the WRC found that the rules of natural justice were not followed by the respondent in dismissing the complainant. The WRC noted that the complainant was invited to a disciplinary investigation meeting on two occasions. On the first occasion, the complainant was on annual leave and could not source representation in time to attend and on the second occasion, she was on certified sick leave. The disciplinary investigation proceeded in her absence, and the complainant was found guilty of gross misconduct. The WRC stated that 'It is normal procedure to ensure that an employee is certified fit and able to participate in an investigation whilst out on certified sick leave. This did not occur and I find that the complainant was dismissed without having the right to respond to the allegations against her.' The Adjudication Officer was of the opinion that the respondent had commenced the disciplinary procedure in an attempt to dismiss the complainant in advance of her reaching her twelve months' service and that this was done because she had made a protected disclosure to HIQA.

The second highest award made was €22,500 in the case of *A Worker v A Communications Provider*.⁵²⁵ Again, the WRC held that the rules of natural justice were not followed by the respondent in this case. Evidence was proffered by the complainant that within an hour of having raised health and safety concerns in relation to unsafe climbing equipment and ladders that had not been certified since 3 March 2013 he was dismissed with immediate

⁵²³ *A Complainant v A Respondent* ADJ-00004519.

⁵²⁴ *An Employee v A Nursing Home* ADJ-00000456.

⁵²⁵ *A Worker v A Communications Provider* ADJ-00001380.

effect. The WRC held that ‘The claimant was summarily dismissed without any regard to due process or the provisions of SI146/2000 or indeed the claimant’s rights under natural justice.’⁵²⁶

In *A Worker v A Service Station*⁵²⁷ the WRC ordered the respondent to pay compensation to the complainant in the amount of €7,020 where it determined on the balance of probabilities that the complainant was dismissed for having made a protected disclosure and not, as the respondent had argued, because of an unfavourable performance review and because of friction between the complainant and other staff. The WRC found that there was no compelling evidence to explain the contradictions between the evidence of the respondent that the complainant had poor performance and her positive appraisal completed four days before her dismissal. Further, in evidence at the hearing, the respondent had confirmed that no member of staff had expressed a grievance in relation to the complainant.

In *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076*⁵²⁸ the EAT ordered for €4,100 to be paid to the complainant. The EAT held that although there was a constructive dismissal, the claimant had not exhausted the internal Procedures made available to him stating that the claimant’s ‘own actions brought him to that point as much as any action on the part of the respondent’. The complainant had sought compensation in the amount of €26,000, but in the circumstances, the EAT made an award of only €4,100.

The lowest award made by the WRC in a s 11 unfair dismissal claim was €2,000 in *Researcher v Employment Agency*,⁵²⁹ which was described by the WRC in its decision as being token compensation of four weeks’ pay as the complainant had gained subsequent employment immediately following her dismissal, so there was no actual financial loss.

Thus, the two largest awards that were made was for an unfair dismissal was €52,416, which equated to two years’ salary, followed by €22,500. The other three awards of compensation €7,020, €4,100 and €2,000 were quite low when one considers that the WRC has the discretion to order up to five years’ remuneration. The two largest awards were made in circumstances where not only did the respondent dismiss the complainant for having made a protected disclosure but also where they failed to follow the rules of natural justice and fair

⁵²⁶ ‘SI146/2000’ refers to the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (SI 2000/146).

⁵²⁷ *A Worker v A Service Station* ADJ-00006640.

⁵²⁸ *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD 981/2015.

⁵²⁹ *Researcher v Employment Agency* ADJ-00010550.

procedures. In both of those cases, the complainant had less than one-year's service. The level of awards being made is relatively low when compared to those in the UK where there have been quite substantial awards made. For example, in *Best v Medical Marketing International Group Plc (in voluntary liq)*⁵³⁰ the claimant was awarded £2,259,088 which equated to two years' and two months' pay, which is similar to the highest unfair dismissal award under the 2014 Act in Ireland where compensation equating to two years' salary was awarded in *An Employee v A Nursing Home*.⁵³¹ In both cases, there was also a finding of a failure to comply with disciplinary and dismissal procedures; however, in *Best* the award was increased by a further 50% to £3,402,245 to reflect this finding. This award is the highest award made under PIDA. In *Fernandes v Netcom Consultants UK Ltd*⁵³² the claimant was awarded £293,441 on the basis that as a fifty-eight-year-old chief financial officer he would not secure similar work in the future. This award represented just over four times his salary. In *Watkinson v Royal Cornwall NHS Trust*⁵³³ the UKEAT awarded £1,201,453 to the claimant, a chief executive of the respondent, which amount included £569,158 for future loss of earnings for the damage to his career as a result of the dismissal and the various detriments he suffered, including suspension, failure to implement a salary increase, and libellous publicity by the respondent. This award represented just over eight times his salary. This award was reduced to around £880,000 on review.

3.10(b)(ii) *Personal liability in unfair dismissal claims*

It is important to note that in Ireland and the UK there is a divergence in the statutory regimes in respect of personal liability for protected disclosures' unfair dismissal claims. In the UK in *International Petroleum Ltd v Osipov*,⁵³⁴ the UKEAT held two non-executive directors of the respondent jointly and severally liable for the unfair dismissal of the claimant for having made a number of protected disclosures. The imposition of personal liability by the UKEAT was grounded on s 47B(1A) of the 1996 Act, which introduced vicarious liability for

⁵³⁰ *Best v Medical Marketing International Group Plc (in voluntary liq)* (ET Case No 1501248/2008, 2 July 2013).

⁵³¹ *An Employee v A Nursing Home* ADJ-00000456.

⁵³² *Fernandes v Netcom Consultants UK Ltd* (ET Case No 22000060/00, 24 January 2000).

⁵³³ *Watkinson v Royal Cornwall NHS Trust* (UKEAT/0378/10/DM, 17 August 2011).

⁵³⁴ *International Petroleum Ltd v Osipov* (UKEAT/0058/17/DA, UKEAT/0229/16/DA, 19 July 2017).

detriments in 2013⁵³⁵ and s 48(5)(b) of the 1996 Act, which provides that a claim under s 47B(1A) can be brought by a worker against another worker or agent.⁵³⁶

Normally for a claim of detriment in the form of an unfair dismissal, the claim can only be brought by an employee against the employer under s 103A of Part X of the 1996 Act due to the limitation in s 47B(2) of the 1996 Act, which provides that s 47B(1) of the 1996 Act does not apply where ‘(a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of Part X).’ Workers other than employees must bring a claim for detriment amounting to unfair dismissal under s 47B(1) of Part V of the 1996 Act.

With respect to a claim of detriment against a worker or agent personally, the UKEAT held in *Osipov* that the restriction in s 47B(2) of the 1996 Act does not apply to a claim under s 47B(1A) of the 1996 Act.⁵³⁷ The UKEAT, therefore, held that employees and workers could bring claims for unfair dismissal against agents and workers personally. The UKEAT stated that:

This construction does not strain the meaning of the legislation, and to my mind creates a coherent approach. It puts employees in the same position as workers who never lose their right to make claims against individuals for detriments amounting to dismissal and ensures that employees are given the same protection as workers who are subjected to the most serious detriments and not put in a worse position than those workers.⁵³⁸

The UKEAT acknowledged that claims against fellow workers would be unusual.⁵³⁹ However, for workers and employees who may be deprived of a remedy for unfair dismissal because their employer is unable to pay compensation, for example, in cases where the employer is insolvent, means that they will have another avenue open to them. In addition, a detriment claim requires a lower threshold to be met, ie ‘on the ground that’, instead of in a dismissal claim, which requires the employee to show that the protected disclosure was ‘the reason or principal reason’ for the dismissal, and therefore, a claim against a fellow worker for unfair dismissal might be easier to satisfy.

⁵³⁵ Employment Rights Act 1996, s 47B(1A), as inserted by Enterprise and Regulatory Reform Act 2013, s 19(1).

⁵³⁶ *ibid* s 48(5)(b), as inserted by Enterprise and Regulatory Reform Act 2013, s 19(2)(b).

⁵³⁷ *International Petroleum Ltd v Osipov* (UKEAT/0058/17/DA, UKEAT/0229/16/DA, 19 July 2017) [155].

⁵³⁸ *ibid* [156].

⁵³⁹ *ibid*.

In Ireland, there is no scope for personal liability for unfair dismissal or penalisation claims under s 11 or s 12 of the 2014 Act. Section 12(2) of the 2014 Act specifically states that the vicarious liability provision for penalisation does not apply to unfair dismissal claims, whilst unfair dismissal claims under s 11 of the 2014 Act is limited to claims by employees only. However, workers, including employees, can bring a claim against a person personally for detriment, which could cover a claim of unfair dismissal, under s 13 of the 2014 Act (or for any loss suffered for a breach of confidentiality under s 16 of the 2014 Act). Therefore, although the approach adopted in the legislation in Ireland is different to that adopted in the UK, both workers and employees can avail of the option of pursuing a person personally for redress for unfair dismissal if the employer is not a suitable respondent. This issue, however, has not arisen in case law in Ireland as of yet but it will be important to assess the extent of its application when it does.

3.10(b)(iii) *Penalisation case law remedies*

The largest award of compensation ordered in a penalisation claim by the WRC was €30,000 in *An Employee v A Public Body*.⁵⁴⁰ In this case, the WRC held that the complainant, a prison officer who had worked for the respondent for twenty-two years and four months, had been subjected to unfair treatment because he had made a protected disclosure in respect of an inefficient use of taxpayers' funds. This unfair treatment was found to be a failure on the part of the respondent to inform the complainant that an extremely serious potential security threat to the complainant and his family did not exist, despite knowing for fifteen months that this was the case.

In the other successful penalisation claim before the WRC, *A Complainant v A Respondent*⁵⁴¹ it ordered for €10,000 to be paid to the complainant. This case also included an order that the respondent removes a disciplinary sanction from the complainant's file. The complainant, in this case, had been suspended and issued a verbal warning in respect of a complaint made against him by a colleague (on his own behalf and that of five other colleagues) and by his manager. The WRC held that the process of investigation and the ensuing discipline were a 'sham' and that there was 'no justification whatsoever in imposing a disciplinary sanction against the complainant other than to penalise him for having made a protected disclosure under the Act.'

⁵⁴⁰ *An Employee v A Public Body* ADJ-00005583.

⁵⁴¹ *A Complainant v A Respondent* ADJ-00004519.

Finally, the Labour Court ordered compensation to be paid to the complainant in *Monaghan v McGrath Partnership* in the amount of €17,500.⁵⁴² The court held that the complainant was penalised for having made a protected disclosure when she was placed on suspension from 20 June 2014 to 7 November 2014.⁵⁴³

Compensation orders for penalisation claims can be difficult to quantify. In the penalisation cases to date, there is no indication as to what factors were included when calculating the amount of compensation awarded. Unlike the position in the UK, there is no guidance under the 2014 Act as to what should be taken into consideration when calculating the amount of compensation to be awarded. In the UK, s 49(2) of the 1996 Act provides that compensation awarded must be such as the tribunal considers to be just and equitable in all the circumstances having regard to ‘(a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant’s right.’⁵⁴⁴ Section 49(3) of the 1996 Act provides further that the loss referred to in s 49(2)(b) must be taken to include ‘(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.’⁵⁴⁵

Thus, compensation for detriment claims include both pecuniary and non-pecuniary loss. The scope of non-pecuniary loss has been addressed in a number of cases, particularly in *Virgo Fidelis Senior School v Boyle*⁵⁴⁶ where the UKEAT awarded compensation for injury to feelings on the basis that protected disclosures claims should be treated the same as discrimination claims. The UKEAT stated in this regard that ‘We see no reason for detriment under section 47B to be treated differently; it is another form of discrimination’⁵⁴⁷ and held that compensation should have been awarded in line with the *Vento* guidelines.⁵⁴⁸ In coming to this conclusion, the UKEAT gave particular attention to the requirement in s 49(2)(a) of the 1996 Act for a tribunal to have regard to the ‘infringement’ to which the complaint relates

⁵⁴² *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC) 18.

⁵⁴³ *ibid.*

⁵⁴⁴ Employment Rights Act 1996, s 49(2)(a) and (b).

⁵⁴⁵ *ibid* s 49(3)(a) and (b).

⁵⁴⁶ *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT).

⁵⁴⁷ *ibid* [44(b)].

⁵⁴⁸ In *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318 (CA) [65]-[68], Lord Justice Mummery sitting in the Court of Appeal suggested that there should be three bands of injury to feelings in discrimination cases. In *Miles v Gilbank* [2006] ICR 1297 (CA) [41], the Court of Appeal held that *Vento* merely provided guidance as to level of awards for injury to feelings in discrimination cases and is not a rule of law.

when making an award of compensation.⁵⁴⁹ There is no similar requirement in relation to a penalisation claim under the 2014 Act. However, if the position adopted in *Virgo Fidelis* is followed in Ireland and a penalisation claim is treated in the same manner as a discrimination claim, then compensation for injury to feelings could be awarded based on the requirement in s 82(1)(c) of the Employment Equality Acts 1998-2015, which provides that redress in a discrimination claim can include ‘an order for compensation for the *effects of acts of discrimination or victimisation*’.⁵⁵⁰

The level of compensation that is considered appropriate in a protected disclosures detriment claim in the UK is considered to be in the top band of injury to feelings as set out in *Vento*. The UKEAT in *Virgo Fidelis* stated that ‘we are firmly of the view that the Tribunal were in error in not having regard to the *Vento* guidelines, albeit that detriment suffered by ‘whistle-blowers’ should normally be regarded by Tribunals as a very serious breach of discrimination legislation.’⁵⁵¹ The UKEAT varied the ET award for injury to feelings from £42,540 to £25,000, albeit noting that this was a very serious case meriting a very high award.⁵⁵²

In addition to injury to feelings, there are other types of damages that can be awarded in detriment claims under PIDA in the UK. Aggravated damages were awarded in *Virgo Fidelis*⁵⁵³ based on the fact that aggravated damages are available in discrimination cases.⁵⁵⁴ Damages can be awarded for personal injury (ie psychiatric damage),⁵⁵⁵ again based on the fact that such damages are available in discrimination claims.⁵⁵⁶ In *Virgo Fidelis*, the UKEAT could see no reason why exemplary damages could not be awarded as long as the *Rookes v Barnard*⁵⁵⁷ limitations do not apply, which was not the case in *Virgo Fidelis*.⁵⁵⁸

⁵⁴⁹ *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT) [44(a)].

⁵⁵⁰ Employment Equality Acts 1998-2015, s 82(1)(c) (emphasis added).

⁵⁵¹ *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT) [45].

⁵⁵² *ibid* [56]. No separate award was made in relation to the psychiatric damage suffered by the respondent, as there was no separate head of claim for this.

⁵⁵³ *ibid* [65].

⁵⁵⁴ *HM Prison Service v Johnson* [1997] ICR 275 (EAT) [40]; *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT) [59]-[65]. The principles underpinning an award of aggravated damages in the context of protected disclosures derive from the UKEAT decision of *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 464 (EAT) [16(2)] which provides that ‘The features that may attract an award of aggravated damages can be classified under three heads - (a) the manner in which the defendant has committed the tort; (b) the motive for it; and (c) the defendant’s conduct subsequent to the tort but in relation to it.’

⁵⁵⁵ *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT) [54(c)].

⁵⁵⁶ *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170 (CA).

⁵⁵⁷ *Rookes v Barnard* [1964] AC 1129 (HL). See footnote 522 in relation to the non-applicability of the *Rookes* limitation in Ireland.

⁵⁵⁸ *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 (EAT) [81] where the UKEAT held that the school was not acting as servants or agents of the executive in exercising their disciplinary powers nor were their actions oppressive, arbitrary, or unconstitutional.

Ultimately, if damages for injury to feelings, aggravated damages, damages for personal injury, and exemplary damages are to be awarded in penalisation claims under the 2014 Act it will be necessary for the treatment of a whistleblower to be considered a discriminatory act, as determined by the UKEAT in *Virgo Fidelis* in the UK, and an argument made that such compensation should be made taking into consideration s 82(1)(c) of the Employment Equality Acts 1998-2015.

In Ireland, some guidance in relation to what compensation can be awarded in a penalisation claim can be gleaned from the case law under s 27 of the Safety, Health and Welfare at Work Act 2005, which contains a similar ‘penalisation’ provision as that contained in the 2014 Act. Significantly, in the case, *Allied Foods Ltd v Sterio*,⁵⁵⁹ the Labour Court relied on the decision of the European Court of Justice, *Von Colson and Kamann v Land Nordrhein-Westfalen*,⁵⁶⁰ when varying the compensation ordered by the Rights Commissioner from €5,000 to €6,000 and stated that ‘where an individual right is infringed, the judicial redress provided should not only compensate for the claimant's economic loss but must provide a real deterrent against future infractions.’ Therefore, any compensation awarded must be effective in deterring acts of penalisation and must be adequate to the damage claimed.⁵⁶¹

3.10(b)(iv) *Motivation in successful penalisation and unfair dismissal claims*

Even though the WRC has the discretion to reduce the level of award being made by up to 25% if the sole or main reason for the worker making the protected disclosure was not the investigation of the relevant wrongdoing, this has not been applied in any case before it. In *An Employee v A Nursing Home*⁵⁶² the respondent had argued that if the Adjudication Officer was to find that the complainant proved her case, then the investigation of the relevant wrongdoing was not the sole or main motivation for making her disclosure. The respondent based its submission on its position that there were inconsistencies between the

⁵⁵⁹ *Allied Foods Ltd v Sterio* HSD 97/2009.

⁵⁶⁰ *Von Colson and Kamann v Land Nordrhein-Westfalen* C 14/83, [1984] ECR 1891.

⁵⁶¹ *ibid.* The Court stated at para 28 of that decision that ‘It should, however, be pointed out to the national court that although Directive No 75/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member States chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.’

⁵⁶² *An Employee v A Nursing Home* ADJ-00000456.

various versions given by the complainant regarding the event that allegedly constituted the protected disclosure and because the complainant made a complaint regarding the respondent to the Garda Síochána that was subsequently deemed to be unfounded. However, the WRC did not address this submission in the decision and in finding that the complainant did make a protected disclosure and was dismissed because of that protected disclosure, two years' salary in compensation was awarded, which equated to €52,416, without any reduction being applied.

3.10(b)(v) *Interim relief case law remedies*

In the first successful interim relief application, *Dougan and Clarke v Lifeline Ambulances Ltd*,⁵⁶³ the respondent refused to reinstate the two applicants in the positions from which they had been dismissed but offered re-engagement to both. Mr Clarke, who had been a director of ambulance operations with the respondent, was offered re-engagement working as a paramedic on the respondent's ambulances, which he refused on the grounds that he had not worked as a full-time paramedic for fourteen years, he would have to be retrained, and that he would be supervised by persons that he had previously managed.⁵⁶⁴ Mr Dougan, who had been an assistant manager with the respondent, was offered re-engagement on 'gardening leave',⁵⁶⁵ which was described by the respondent as being a 'zero hours contract with 40 hours pay'.⁵⁶⁶ His Honour Judge Comerford held that the rejection of the offer of re-engagement by Mr Clarke was reasonable and that although the offer to Mr Dougan did not require a response, if it did require one, a refusal would also be reasonable.⁵⁶⁷ It is clear that the rationale behind His Honour Judge Comerford's acceptance of the applicants' rejection for re-engagement was based on the view that the offers made by the respondent were in contravention of sch 1, s 2(3)(b) of the 2014 Act which provides that the terms and conditions of the position offered in re-engagement must not be less favourable than those which would have been applicable to the employee if he or she had not been dismissed. His Honour Judge Comerford made an order for the continuation of the applicants' contracts of employment from the date of termination until the determination or settlement of the dispute for the purposes of pay or any other benefit derived from the employment, seniority, pension rights

⁵⁶³ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC). The facts of this case are discussed in the 'Type of claim' section.

⁵⁶⁴ *ibid* 219.

⁵⁶⁵ *ibid*.

⁵⁶⁶ 'Hall's ambulance company ordered to continue paying whistleblowers' *The Irish Times* (Dublin, 30 July 2016) 4.

⁵⁶⁷ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC) 219.

and other similar matters, and also for the purposes of determining the period of reckonable employment.

Concern has been raised that continuation orders, like those made in the *Dougan and Clarke* case, could lead to ‘double recovery’ if an employee is also successful in their unfair dismissal claim before the WRC. In that regard, it has been suggested that payments made to employees under continuation orders should be offset against any award made in the substantive unfair dismissal case.⁵⁶⁸

3.11 Subject to appeal

3.11(a) Introduction

As mentioned earlier, eleven of the unsuccessful WRC decisions under the 2014 Act were appealed to the Labour Court. Appeals from a decision of an Adjudication Officer must be made to the Labour Court by giving a notice in writing⁵⁶⁹ within forty-two days from the date of the decision concerned.⁵⁷⁰ The Labour Court may direct that such a notice may be given to it after the expiration of the forty-two day period specified if it is satisfied that the notice was not so given before such expiration due to the existence of exceptional circumstances.⁵⁷¹ When such an appeal is made, the Labour Court must do the following: (i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal;⁵⁷² (ii) make a decision in relation to the appeal in accordance with the ‘relevant redress provision’;⁵⁷³ and (iii) give the parties to the appeal a copy of that decision in writing.⁵⁷⁴ The ‘relevant redress provision’ in this regard is sch 2, s 2(1)(b) of the 2014 Act which provides that on appeal, the Labour Court shall ‘make a determination in writing in relation to the appeal affirming, varying, or setting aside the decision’ of the Adjudication Officer.⁵⁷⁵ A party to the proceedings before the Labour Court may appeal a determination of the Labour Court to the High Court on a point of law not later than forty-two days from

⁵⁶⁸ Donall O’Riordan, ‘The Protected Disclosures Act 2014-Practicalities and Recent Developments’ (2017) 14(1) Irish Employment Law Journal 10, 17.

⁵⁶⁹ Workplace Relations Act 2015, s 44(2).

⁵⁷⁰ *ibid* s 44(3).

⁵⁷¹ *ibid* s 44(4).

⁵⁷² *ibid* s 44(1)(a)(i).

⁵⁷³ *ibid* s 44(1)(a)(ii).

⁵⁷⁴ *ibid* s 44(1)(a)(iii).

⁵⁷⁵ Protected Disclosures Act 2014, sch 2, s 2(1)(b).

the service on that party of notice of the decision of the Labour Court, and this determination of the High Court will be final and conclusive.⁵⁷⁶

3.11(b) *Case law analysis*

All eleven Labour Court cases under the 2014 Act were appeals brought by the worker. Only one of those cases was successful.⁵⁷⁷ Of the ten unsuccessful cases, only three of the cases were unsuccessful for the same reasons as decided by the WRC. In the WRC decision, *A Senior Official v A Local Authority*,⁵⁷⁸ and in its appeal before the Labour Court, *Fingal CC v O'Brien*,⁵⁷⁹ it was determined that the worker had made protected disclosures but that he was not penalised because of or in retaliation for having made those protected disclosures. In the WRC decision *Bank Official v Banking Sector*,⁵⁸⁰ and its appeal before the Labour Court, *AIB v Murphy*,⁵⁸¹ it was determined that the application was out of time. Finally, in the WRC decision, *Claimant v Respondent*,⁵⁸² and in its appeal before the Labour Court, *QFF Distribution Ltd v O'Reilly*,⁵⁸³ it was also determined that the application was out of time.

Of those cases where the claims were unsuccessful, seven of the cases were determined to be unsuccessful by the Labour Court for different reasons than those given by the WRC. The disclosures in *Training Co-ordinator v A Social Support Service*⁵⁸⁴ and *A Service Engineer v A Provider of Plant Machinery*⁵⁸⁵ were determined by the WRC not to be protected disclosures, whilst the Labour Court decided in their corresponding appeals, *Kerry Parents & Friends Association v O'Connor Flemming*⁵⁸⁶ and *Loxam Ltd v Brunkard*⁵⁸⁷ that the claims were filed out of time. In *A Fire Station Officer (retired) v A Local Authority*⁵⁸⁸ the WRC found that the claim was out of time, whilst the Labour Court in the appeal, *Galway CC v Connolly*,⁵⁸⁹ held that there was no penalisation.

⁵⁷⁶ Workplace Relations Act 2015, s 46.

⁵⁷⁷ *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC) 15.

⁵⁷⁸ *A Senior Official v A Local Authority* ADJ-00001721.

⁵⁷⁹ *Fingal CC v O'Brien* PDD 4/2018.

⁵⁸⁰ *Bank Official v Banking Sector* ADJ-00005011.

⁵⁸¹ *AIB v Murphy* PDD 1/2018.

⁵⁸² *Claimant v Respondent* ADJ-00002571.

⁵⁸³ *QFF Distribution Ltd v O'Reilly* PDD 1/2017.

⁵⁸⁴ *Training Co-ordinator v A Social Support Service* ADJ-00002320.

⁵⁸⁵ *A Service Engineer v A Provider of Plant Machinery* ADJ-00007236.

⁵⁸⁶ *Kerry Parents & Friends Association v O'Connor Flemming* PDD 2/2017.

⁵⁸⁷ *Loxam Ltd v Brunkard* UD 1755.

⁵⁸⁸ *A Fire Station Officer (retired) v A Local Authority* ADJ-00004684.

⁵⁸⁹ *Galway CC v Connolly* PDD 2/2018.

In *A Commercialisation Specialist v A Government Agency*⁵⁹⁰ the WRC held that the complainant had not made a protected disclosure but had raised a personal grievance, whilst the Labour Court in its appeal, *Enterprise Ireland v Carroll*⁵⁹¹ found that there was no evidence of penalisation. The test for penalisation requires that the Labour Court first determine that a protected disclosure is made before it proceeds to assess whether there has been penalisation.⁵⁹² However, in this case, the Labour Court did not determine whether a protected disclosure was made on the basis of the presumption in s 5(8) of the 2014 Act and the fact that the respondent did not make a substantive submission to the Labour Court on the incidents claimed to constitute protected disclosures. The Labour Court stated in this regard that ‘the Court is of the view that it is neither necessary nor appropriate for it to offer its opinion as to whether those incidents constitute protected disclosures within the meaning of the 2014 Act.’ Therefore, even though the decisions of the WRC and the Labour Court differ, this appears to be because of the different evidence proffered by the parties in both hearings.

In the decision, *Accounts Administrator v A University*,⁵⁹³ the WRC failed to grant the complainant’s request for an adjournment due to a number of prior adjournments being granted, the serious nature of the claim, a lack of serious justified reason for the adjournment, and to ensure fair procedures. In *Accounts Administrator v A University*⁵⁹⁴ the claim failed because it was deemed to be out of time. Both appeals, the former being *University of Limerick v Roche*⁵⁹⁵ and the latter being *University of Limerick v Copley*⁵⁹⁶ were subsequently struck out for want of prosecution because neither of the complainants appeared on the hearing date.

The identification of cases as being unsuccessful before the WRC and the Labour Court for different reasons demonstrates a high level of inconsistency in the interpretation and application of the law between the WRC and the Labour Court. This inconsistency, however, may be due to the fact that the hearing before the Labour Court is *de novo* and therefore different evidence may be presented before the WRC and the Labour Court. It must be noted,

⁵⁹⁰ *A Commercialisation Specialist v A Government Agency* ADJ-00007228.

⁵⁹¹ *Enterprise Ireland v Carroll* PDD 3/2018.

⁵⁹² The test for penalisation was established in *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC) 15, discussed in the ‘Type of claim’ section.

⁵⁹³ *Accounts Administrator v A University* ADJ-00004380.

⁵⁹⁴ *Accounts Administrator v A University* ADJ-00000305.

⁵⁹⁵ *University of Limerick v Roche* PDD 3/2017.

⁵⁹⁶ *University of Limerick v Copley* PDD 4/2017.

though, that 55% (six) of the unsuccessful Labour Court cases failed due to procedural reasons, ie four of those cases were deemed to be out of time, and two of the cases failed because the complainants did not attend before the Court on the hearing date. Nonetheless, there may be a higher risk of an erroneous application of the 2014 Act due to a lack of adequate training provided to members of the Labour Court compared to Adjudication Officers of the WRC.⁵⁹⁷

3.12 Conclusion

There has been criticism of the value of case law statistics in the UK, where it has been described as having a somewhat limited impact on the assessment of the effectiveness of PIDA in promoting transparency in the workplace.⁵⁹⁸ However, the purpose of the case law analysis herein was not to assess the effectiveness of the 2014 Act in promoting transparency in the workplace but to measure the impact of the interpretation and application of the 2014 Act on the purpose of the 2014 Act, to identify any issues associated with same, and to suggest reform where problems are identified.

The DPER Statutory Review published in July 2018 claimed ‘There is still a limited amount of case law from which to draw conclusions on any weaknesses in the legal framework established by the Act that may need to be addressed.’⁵⁹⁹ The researcher disputes this statement and argues that the findings from the case law analysis undertaken in this thesis highlights the weaknesses of the 2014 Act and identifies issues that need to be addressed.

From the case law analysis, it appears that the attraction for complainants is to file their claim under the 2014 Act before the WRC. The intention underpinning the establishment of the WRC was for disputes to be resolved in an informal manner that was both speedy and inexpensive. As one of the forums designated to resolve disputes under the 2014 Act, the WRC is arguably an appropriate one. Its non-imposition of costs orders and fees is extremely attractive for complainants, especially in light of the difficulties with these in the UK. Further, unlike a claim before the civil courts, which attracts both fees and costs orders, the short processing times and the hearing of claims in private before the WRC are also beneficial for a complainant under the 2014 Act. Nonetheless, the short time frame for the

⁵⁹⁷ The issue of training for WRC Adjudication Officers and members of the Labour Court is discussed in the ‘Win/lose’ section.

⁵⁹⁸ Jeanette Ashton, ‘15 Years of Whistleblowing Protection under the Public Interest Disclosures Act 1998: Are We Still Shooting the Messenger?’ (2015) 44(1) *Industrial Law Journal* 39.

⁵⁹⁹ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 22.

filing of a complaint and the cap on an award of compensation are disadvantages to filing a claim before the WRC. However, these advantages and disadvantages only apply to employees who file claims before the WRC as workers other than employees can only avail of a claim before the civil courts.

With respect to the time frame for filing complaints, the six-month time limit is far too short for claims of penalisation under the 2014 Act. It is recommended that the 2014 Act is amended to reflect the position in the UK where s 48(3)(a) of the 1996 Act provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure. Section 48(4)(a) of the 1996 Act goes on to clarify that ‘where an act extends over a period, the ‘date of the act’ means the last day of that period.’ By adopting such a provision in Ireland, this would mean that if a worker is suspended for having made a protected disclosure under the 2014 Act and this occurs outside of the six-month time limit but is still suspended at the time of the filing of the complaint or within six months before the complaint is filed, the worker can still avail of redress. As the law currently stands in Ireland, this absence in the 2014 Act of a provision such as s 48(3)(a) of the 1996 Act, means that a worker could be subjected to a series of acts or omissions that affect the worker to the worker’s detriment, but they may not be able to successfully claim for all or part of that penalisation because it occurred outside of the six-month period before the claim is filed. This limitation clearly can result in an injustice to the worker by depriving them of the protections under the 2014 Act and allows for the employer to evade liability.

In relation to the issue of the cap on compensation for a penalisation claim, this is arguably an unnecessary limitation of the 2014 Act. If a person suffers a loss, then they should be compensated for that loss, irrespective of how much it is. The amount of compensation awarded should place the worker in the position they were in before the penalisation occurred. It is recommended that the approach adopted in the UK not to impose a cap on the amount of compensation awarded should be implemented in Ireland. The level of awards in Ireland to date is significantly lower than those that have been awarded in the UK. In explaining the rationale of the uncapped compensation in the UK, the then Secretary of State for Trade and Industry, Stephen Byers, stated that ‘There are many cases in which public interest was important, and the House must send out a clear message underlining how seriously we regard that issue. To say that compensation will be unlimited is the best possible

demonstration of the importance we attach to that matter.’⁶⁰⁰ This rationale in relation to the public interest, as well as the purpose of the 2014 Act to protect disclosers, should underscore the adoption of uncapped compensation in Ireland. In addition, the implementation of uncapped compensation would underscore the fact that many whistleblowers are blacklisted and cannot secure the same or similar employment after they blow the whistle and thus suffer a greater loss than five years’ gross remuneration. Uncapped compensation would also take account of the fact that some acts of penalisation are egregious and therefore employers should be sufficiently punished for such acts, whilst other employers should be deterred from taking such action against whistleblowers. Further, uncapped compensation would reflect the fact that many whistleblowers suffer severe personal injury, most notably in the form of psychiatric injury, as well as injury to feelings.

This issue in relation to compensation also concerns the different types of damages that can be awarded under the 2014 Act and this issue needs to be addressed in Ireland. In the UK, awards for detriment are treated in the same manner as discrimination claims. A provision such as s 49(2) of the 1996 Act in the UK should be included in the 2014 Act to provide guidance as to what should be taken into consideration when an award in a penalisation claim is being made. Currently, there is no such guidance, and this is resulting in an inconsistent approach to the award of damages, where awards are being made in an ad hoc manner. In the case law analysed, there were no cases that concerned an argument that claims of penalisation should be treated in the same manner as a discrimination claim and that compensation for injury to feelings should be awarded on the basis of s 82(1)(c) of the Employment Equality Acts 1998-2015. Thus, it remains to be seen whether such an approach will be adopted in Ireland, although arguably it should be in order to ensure a worker is properly compensated for any penalisation suffered.

Further, in respect of the issue of compensation, there appears to be an unnecessary limitation in the 2014 Act where a worker cannot be compensated for both unfair dismissal and any other penalisation. Again, the 2014 Act should be amended to remove the limitation under s 12(2) and (4) in order to ensure that a worker who is unfairly dismissed is properly compensated for any other wrongs suffered by them. This amendment would again mean that, as well as fulfilling the purpose of the 2014 Act, an employer who both dismisses a worker for having made a protected disclosure and penalises that worker in other forms in

⁶⁰⁰ HC Deb 30 March 1999, vol 328, col 877.

retaliation for having made a protected disclosure is punished accordingly and other employers are deterred from similar future infractions.

Of course, compensation can only be awarded in successful cases. There is, however, a high rate of unsuccessful cases under the 2014 Act. There is a similarity in the rate of successful cases under the 2014 Act and those under PIDA in the UK, albeit the rate of successful cases in Ireland is slightly higher. Not surprisingly, the number of PIDA cases in the UK is far greater than cases in Ireland under the 2014 Act and undoubtedly, the rates of successful and unsuccessful cases under the 2014 Act will fluctuate as time goes on. It will be important to examine whether the rates of unsuccessful cases under the 2014 Act continue to outweigh the successful ones. By assessing the reasons for the high rate of unsuccessful cases at this stage, this may mean that certain issues with the 2014 Act are identified, and concerns regarding the interpretation and application of the 2014 Act can be addressed so that the disparity between the rates of successful and unsuccessful cases can be reduced as soon as possible.

Looking at the position in Ireland, there were a number of reasons identified for the low success rates of cases under the 2014 Act. One of those potential reasons is that the 2014 Act is being abused by workers who do not qualify for ordinary dismissal claims because they have less than one-year's continuous service that would entitle them to bring such a claim. When assessing the length of service of complainants under the 2014 Act, it was identified that the largest group of complainants were workers who had less than one-year's continuous service and that the vast majority of those workers brought an unfair dismissal/interim relief claim. It was noted, however, that 50% (four) of those cases were successful and therefore not all of those workers were using the 2014 Act to circumvent the qualifying period for ordinary unfair dismissal. Nonetheless, there is scope for the 2014 Act to be subject to abuse in this regard and it is recognised that this is an issue that needs to be monitored going forward in order to establish whether the non-qualifying period for an unfair dismissal claim under the 2014 Act is resulting in frivolous or malicious claims being brought. If a pattern of unsuccessful unfair dismissal claims by workers with less than one-year's continuous service does emanate then, it may be necessary for the Oireachtas to address the requirement of a qualifying period for ordinary unfair dismissal claims.

The second potential issue identified for the high rate of unsuccessful cases is the erroneous interpretation and application of the 2014 Act by Adjudication Officers and Labour Court

members. One notable issue in this regard was the different approaches adopted in relation to unfair dismissal claims. In order to ensure fairness, and that all workers who are entitled to protection are afforded it, there needs to be consistency in the approaches adopted in such cases. Further, although the test for penalisation was set down in *Monaghan v McGrath Partnership*,⁶⁰¹ this test was not referred to in a number of subsequent penalisation claims. Also, the fact that only three of the eleven WRC cases appealed to the Labour Court were ultimately decided for the same reason as the WRC may indicate a level of inconsistency in the interpretation and application of the 2014 Act, bearing in mind that the appeal to the Labour Court is *de novo*. There was also evidence of a number of decisions where the 2014 Act was blatantly applied incorrectly.⁶⁰²

Further, the fact that there is no public interest test in the 2014 Act,⁶⁰³ but an exclusion of legal obligations that arise under a worker's contract of employment, means that some issues that may be in the public interest and constitute a relevant wrongdoing are being excluded because they also fall within the worker's contract of employment. An argument could be made for the inclusion of a public interest test, as adopted in the UK, instead of the approach employed in Ireland to ensure that protected disclosures that are intermingled with personal grievances are not excluded from protection. The 2014 Act is still in its infancy, therefore as the number of cases under the 2014 Act increase, it is hoped that those who are interpreting and applying it will develop a deeper familiarity with its provisions. Nonetheless, there is a strong case to be made for the delivery of intensive training to Adjudication Officers and Labour Court members in order to ensure that there is a proper understanding of the 2014 Act and that it is interpreted and applied correctly.

When looking at the sectors from which claims under the 2014 Act derive, the data indicates that the majority of the claims emanate from the private sector, followed by the public sector and then the non-profit sector. This hierarchy reflects the number of workers in these sectors, and this may explain the rates of claims from each sector. There may also be an argument

⁶⁰¹ *Monaghan v McGrath Partnership* [2017] 28 ELR 8 (LC).

⁶⁰² For example, *Monaghan v McGrath Partnership* r-151162-pd-1415R; *Carr v Donegal CC* r-153749-pd-14; *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076* UD 981/2015; *A Fire Station Officer (retired) v A Local Authority* ADJ-00007228; *AIB v Murphy* PDD 1/2018; *Donegal CC v Carr* [2017] 28 ELR 259 (LC).

⁶⁰³ For the purposes of a 'relevant wrongdoing', no public interest test applies. The exception to this is if the disclosure concerned the unlawful acquisition, use, or disclosure of a trade secret within the meaning of the European Union (Protection of Trade Secrets) Regulations 2018, SI 2018/188 then then disclosure will only be a protected disclosure provided that the worker has acted for the purposes of protecting the general public interest. Protected Disclosures Act 2014, s 5(7A).

for the implementation of Procedures. As can be seen from the IAW survey, a very low rate of employers in the private and non-profit sectors indicated that they had a whistleblowing policy or guidance,⁶⁰⁴ which is in stark contrast to the estimated 94% of public bodies that have Procedures in place.⁶⁰⁵ However, as will be seen in Chapter 4, only 29% (twenty-nine) of prescribed persons had Procedures available on their websites. Therefore, the impact of having Procedures on the data derived from the case law under the 2014 Act is something that should be assessed in the future, especially if the obligation on private organisations to establish Procedures for internal reporting and following-up of reports under the draft EU Commission Directive on whistleblowing is adopted. The necessity to establish and maintain Procedures is underscored by the finding in the case law analysis that in 89% (thirty-one) of the cases under the 2014 Act, the disclosure was made internally to the employer in the first instance. This finding demonstrates that employers in the majority of cases are given the opportunity to address the wrongdoing and to provide protection to the worker. If the employer does not avail of the opportunity to deal with the disclosure and the worker appropriately, there is evidence from the case law analysis that the worker will then proceed to make their disclosure externally from the organisation. Therefore, if proper Procedures are implemented so that disclosures are addressed appropriately and workers are afforded protection, then a worker should not need to bring a claim under the 2014 Act. It must be recognised, however, that from the case law analysis, the non-existence of Procedures, or the existence of defective Procedures, does not appear to have any impact on the liability of an employer under the 2014 Act, even when that employer is a public body. There needs to be more of an incentive for an organisation to establish and maintain Procedures, such as the imposition of a sanction for failing to do so. If this incentive is not included in legislation, then the Adjudication Officers and Labour Court members need to put more weight on this issue, especially as the case law analysis demonstrates that great weight is being placed on whether a worker complied with Procedures when determining if a worker made a protected disclosure.

The case law analysis conducted for this thesis highlights the deficiencies of the 2014 Act and finds that it is not achieving its purpose of protecting workers. However, an analysis of the case law under the 2014 Act in isolation cannot provide a complete assessment of

⁶⁰⁴ Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 42.

⁶⁰⁵ *ibid* 33.

whether the 2014 Act is fulfilling its purpose. Therefore, the research presented in the subsequent chapters assists in providing a comprehensive evaluation of this issue.

Chapter 4: The prescribed persons' system under the Protected Disclosures Act 2014

4.1 Introduction

The Protected Disclosures Act 2014 ('2014 Act') provides for a number of channels through which a worker can make their disclosure. The legislation incentivises internal reporting to the worker's employer by requiring the least onerous conditions to be satisfied by the worker in order to attract the statutory protections of the 2014 Act. However, it is not always appropriate for the worker to make their disclosure to their employer, for example, if the employer is involved in the wrongdoing, and therefore the 2014 Act provides for alternative channels, such as disclosure to a prescribed person. This disclosure channel regime is discussed in Chapter 3 and is referred to colloquially as a 'stepped disclosure regime'. A disclosure to a prescribed person is considered to be a second step disclosure and requires the worker to satisfy additional conditions than if the disclosure had been made to their employer.

This chapter looks at the following questions:

1. What is the role of prescribed persons under the 2014 Act?
2. Are protected disclosures being made to prescribed persons? Are prescribed persons complying with their obligation under s 22 of the 2014 Act to publish annual reports on protected disclosures?
3. Do prescribed persons understand their role under the 2014 Act?
4. Are prescribed persons complying with their obligations under s 21(1) of the 2014 Act to establish and maintain protected disclosures procedures ('Procedures') and under s 21(4) of the 2014 Act to have regard to the Guidance issued by the Department of Public Expenditure and Reform ('DPER') for the purpose of assisting public bodies in their establishment and maintenance of the Procedures⁶⁰⁶ ('DPER Guidance')?

4.1(a) Objectives

⁶⁰⁶ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).

The research conducted for this chapter is intended to identify weaknesses in the prescribed persons' system under the 2014 Act and to make recommendations in order to improve the system. It is also designed to identify the compliance rate of prescribed persons with their obligations under s 21 and s 22 of the 2014 Act, to highlight any deficiencies with these obligations, and to make suggestions to enhance their impact. The objective of the combination of the approaches outlined is to ascertain whether the purpose of the 2014 Act is being achieved.

4.1(b) Methodology

In conducting the research for this chapter, there were five approaches used:

(i) On 15 January 2018, the three and a half year anniversary of the 2014 Act, the websites of all the persons prescribed under SI 2014/339, SI 2015/448, and SI 2016/490 ('prescribed persons' SIs') were accessed in order to: (a) establish their existence; (b) to locate their annual reports; and (c) to find their Procedures. The prescribed persons under the 2014 Act consist of both local authorities and organisations other than local authorities. In order to ensure consistency and fairness, the websites of seventy-one organisations other than local authorities who are designated as prescribed persons were accessed on 15 January 2018. On 16 January 2018, the websites of the thirty-one local authorities were then accessed. Although not all websites were accessed on the same day, the segregation of the prescribed persons into two types of prescribed persons, local authorities and organisations other than local authorities, and the accessing of the websites of each group on the same day ensured fairness in the research carried out. A follow-up search was conducted on the 17 and 18 February 2018 when all organisations whose Procedures were not located during the search undertaken on 15 and 16 January were subject to a further Google search where the name of the organisation and the term 'protected disclosure' were used in the Google search engine.

(ii) An analysis of both the statutory annual protected disclosure reports published by prescribed persons and the case law under the 2014 Act was undertaken to ascertain whether disclosures are being made to prescribed persons.

(iii) In order to assess the prescribed persons' Procedures in light of the DPER Guidance, a checklist was drafted of the issues outlined in the DPER Guidance that should be included

in Procedures.⁶⁰⁷ The checklist contained twenty-two of the twenty-six issues in the DPER Guidance,⁶⁰⁸ which were then subdivided into 112 issues. One of the twenty-two issues contained information relating to law enforcement matters and consisted of two sub-issues. As none of the prescribed persons whose Procedures were analysed dealt with matters relating to law enforcement matters,⁶⁰⁹ this issue was omitted in the calculation of compliance with the DPER Guidance, and thus only 110 sub-issues were used.

The twenty-two of the twenty-six issues from the DPER Guidance were compiled into nineteen issues for the purposes of the checklist. These issues were as follows:

1. Policy statement
2. Application
3. What is a protected disclosure? This included the issues in the DPER Guidance of ‘Relevant wrongdoings’, ‘Disclosure of information’, ‘Reasonable belief’, and ‘In connection with their employment’
4. Making a protected disclosure
5. Disclosure in the area of law enforcement, security, defence, international relations and intelligence
6. Protection against penalisation (including dismissal and detriment)
7. Confidentiality/protection of identity
8. Anonymous disclosures
9. Personal complaint vs protected disclosures
10. Motivation
11. Assessment and Investigation
12. Protection of the rights of Respondents
13. Disciplinary record of discloser and other related matters
14. Feedback
15. Support and Advice
16. Review
17. Non-restriction of rights to make protected disclosures

⁶⁰⁷ See: Appendix 3(a), ‘DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’.

⁶⁰⁸ The issues of ‘Responsibility’, ‘Consultation and provision of information and training’, ‘Adaptation of Procedures’, and ‘Central over-sight/co-ordination of information’ were omitted from the analysis as these issues could not be readily assessed from the Procedures.

⁶⁰⁹ The Garda Síochána Ombudsman Commission (‘GSOC’) has been designated as the prescribed person under Protected Disclosures Act 2014 (s 7(2)) Order 2014, SI 2014/339 to receive disclosures under Protected Disclosures Act 2014, s 7. However, GSOC’s Procedures were not available publicly for analysis.

18. Mandatory reporting

19. The information that should be provided in a disclosure

(iv) On 17 January 2018, a Research Ethics Application was made via Middlesex Online Research Ethics ('MORE') for approval for the administering of a survey to prescribed persons under the 2014 Act. This application was approved on 18 February 2018. The survey was administered via Qualtrics Survey Software.⁶¹⁰ An email was sent to ninety-six prescribed persons on 5 April 2018, which included a cover letter. The cover letter detailed the purpose of the survey; who should complete the survey; consent; confidentiality; use and storage of data collected; the timeframe for completion of the survey; and an email address where queries can be sent.⁶¹¹ Reminder emails were sent on 13 April 2018, 18 April 2018, 23 April 2018, 27 April 2018, 30 April 2018, and 1 May 2018. The deadline was extended from 19 April 2018 to 1 May 2018 due to an initial low response rate.

The response rates to the survey were assessed and analysed. Further, the survey answers were also subject to scrutiny. The survey answers shed light on how the prescribed persons' system is operating, highlighting any weaknesses of the system and any areas requiring reform. The purpose of the survey was also to substantiate the findings of the website, annual reports, and Procedures assessments. The responses to the survey have been anonymised in line with the commitment to confidentiality in the survey cover letter.⁶¹²

(v) The research undertaken for this chapter also used a doctrinal method of research and referenced international and national reports, articles, books, statutory rules, case law, and parliamentary debates.

4.2 What is the role of prescribed persons under the 2014 Act?

4.2(a) Introduction

In order to assess the role of prescribed persons under the 2014 Act the following issues were examined: (i) Why are disclosures made to a prescribed person? (ii) What are the legal requirements for making a disclosure to a prescribed person? and (iii) What persons are prescribed and who should be prescribed under s 7 of the 2014 Act?

⁶¹⁰ See: Appendix 2(b), 'Protected Disclosures Prescribed Person Survey'.

⁶¹¹ See: Appendix 2(a), 'Prescribed Persons' Survey Cover Letter'.

⁶¹² See: Appendix 2(c), 'Default Report Protected Disclosures Prescribed Person Survey'.

4.2(b) *Why are disclosures made to a prescribed person?*

The prescribed persons' system has been described as a 'halfway house' between disclosures to an employer and disclosures in the public domain.⁶¹³ The 2014 Act is designed to promote internal disclosures, but this is not always appropriate, especially if the worker's employer is involved in the wrongdoing or has failed to respond adequately or at all to a disclosure of wrongdoing. The UK National Audit Office ('UK NAO') in their 2015 report on prescribed persons recognised that the making of a disclosure externally from the employer to a prescribed person means that the system for disclosures is not working properly, stating:

A concern is usually raised first with the employer. In such cases, where appropriately handled, no further stages of reporting would be necessary. The number of concerns raised externally, and how they vary over time, is an indicator of how effectively the system is working. The need for prescribed persons will always exist. But in a well-performing system reporting to them should be the exception, not the rule.⁶¹⁴

A prescribed person is independent of the worker's employer and usually has the authority to both investigate disclosures and to hold their regulated entities to account.⁶¹⁵ In general, prescribed persons have regulatory functions in the area that is the subject of the disclosure.⁶¹⁶

Savage and Hyde emphasise that 'Regulators need whistleblowers; whistleblowers need regulators.'⁶¹⁷ They argue that disclosures from workers can have a positive influence on regulatory practice.⁶¹⁸ Workers in regulated bodies are well placed to access information on a day-to-day basis that the regulator may not be able to access. In the corollary, the role played by regulators in the whistleblowing process can also be a positive one as regulators have the potential to vindicate and address the concerns raised by the worker.⁶¹⁹ There is a public interest in disclosures of wrongdoings being made to the appropriate prescribed

⁶¹³ Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2015) 35 *Legal Studies* 408, 415.

⁶¹⁴ National Audit Office, 'The role of prescribed persons' (NAO 27 February 2015) 29.

⁶¹⁵ Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 5 Middlesex University Erepository.

⁶¹⁶ Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (DPER July 2018) 7.

⁶¹⁷ Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2015) 35 *Legal Studies* 408, 408.

⁶¹⁸ *ibid* 409.

⁶¹⁹ *ibid* 410; Department for Business, Energy and Industrial Strategy, 'Whistleblowing, Prescribed Persons Guidance' (BEIS March 2015) 4.

person.⁶²⁰ Indeed, by disclosing to a regulator not only is it expected that it can address the particular wrongdoing disclosed, but it is also expected that it can have an overall influence on the behaviour of the regulated bodies as the regulator should have the requisite legal authority and resources to achieve this. As Savage and Hyde explain ‘Through a whistleblowing disclosure by a worker and a response by a regulator, the regulatory capacity of both is enhanced, as the whistleblower would not have had the organisational capacity to affect changes within the regulated entity and the regulator would not have been positioned to detect the regulatory non-compliance.’⁶²¹

It has been recognised that disclosers ultimately view prescribed persons as being the solution to addressing their concern.⁶²² Nonetheless, it was identified in the UK by the Department for Business, Energy and Industrial Strategy (‘UK BEIS’) in its whistleblowing framework call for evidence that this expectation is not always met and can lead to a lack of confidence in the system.⁶²³ It was recognised that this lack of confidence centres around the paucity of communication from prescribed persons and that one of the roots of this issue is that prescribed persons often operate within particular constraints, including overriding legal obligations, and this can result in prescribed persons being restricted from providing feedback in relation to the progress or outcome of investigations.

In the survey carried out by the UK NAO for their 2015 report on prescribed persons, ten of the seventeen whistleblowers surveyed stated that their expectations were not met by the prescribed person because it did not investigate their disclosure.⁶²⁴ The UK NAO also identified a range of factors that can result in this expectation gap, namely: (i) different prescribed persons have different prescribed powers meaning that some regulators can act on the disclosure by taking enforcement actions, whilst others cannot; (ii) prescribed persons are not legally required to investigate all concerns that are received by them, and each prescribed person decides which disclosure merits investigation; (iii) prescribed persons sometimes receive a number of similar disclosures which are responded to in a broader manner, such as adding a new area to their routine inspection programme, leaving a worker feeling that their specific disclosure has not been addressed; and (iv) prescribed persons

⁶²⁰ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 5.65.

⁶²¹ Ashley Savage and Richard Hyde, ‘The response to whistleblowing by regulators: a practical perspective’ (2015) 35 *Legal Studies* 408, 413.

⁶²² Department for Business, Energy and Industrial Strategy, ‘Whistleblowing Framework Call for Evidence, Government Response’ (BEIS June 2014) 6.

⁶²³ *ibid* 6 and 15.

⁶²⁴ National Audit Office, ‘The role of prescribed persons’ (NAO 27 February 2015) 17.

cannot protect workers against penalisation or dismissal, nor can they provide legal advice.⁶²⁵ To fill this gap, the UK NAO recommended that prescribed persons ‘clearly state powers and responsibilities to manage whistleblower’s expectations ... Whistleblowers also need to know that there are proper procedures in place to deal with their concerns and what will happen if they raise a concern.’⁶²⁶

In order to remedy this deficiency in the prescribed persons’ system, the UK government introduced an obligation on prescribed persons to report annually on the disclosures received by them.⁶²⁷ This reporting obligation was intended to result in greater transparency, thus instilling confidence in the actions of prescribed persons, driving up standards across all prescribed persons, and ‘striking a balance between the desire of individuals to know action has been taken in respect of their disclosure, with the constraints that prescribed persons operate within, such as their responsibilities to maintain confidentiality.’⁶²⁸ However, the introduction of this reporting obligation alone is not sufficient to fill the expectation gap.

In Ireland, unlike in the UK, prescribed persons are legally obliged to comply with both the annual reporting requirement⁶²⁹ and the requirement to establish Procedures.⁶³⁰ It would be expected that based on the research in the UK that identified expectation gaps in the prescribed persons’ system, that these legal obligations would promote the making of disclosures to such persons when the need arises. As the UK BEIS guidance for prescribed persons explains ‘There is an implied role for prescribed persons to play in the whistleblowing process.’⁶³¹ The making of disclosures to a prescribed person can be an attractive one for workers in circumstances where the worker is unable or unwilling to make their disclosure to their employer and where the prescribed person has the necessary investigative and enforcement powers to address the wrongdoing. The essential requirement for promoting the making of disclosures to prescribed persons is that the worker has confidence in the role of the prescribed person, which can be achieved through transparency

⁶²⁵ *ibid* 18.

⁶²⁶ *ibid* 17.

⁶²⁷ The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507. These Regulations were made by the Secretary of State in the exercise of powers conferred by Employment Rights Act 1996, s 43FA, as inserted by Small Business, Enterprise and Employment Act 2015, s 148(1) and (2).

⁶²⁸ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing Framework Call for Evidence, Government Response’ (BEIS June 2014) 15.

⁶²⁹ Protected Disclosures Act 2014, s 22.

⁶³⁰ *ibid* s 21.

⁶³¹ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing, Prescribed Persons Guidance’ (BEIS March 2015) 4.

and communication of actions taken in respect of other disclosures and actions that can be taken in respect of their particular disclosure, be it as a specific action on foot of that disclosure or as a broader action in relation to the organisation as a whole over which the prescribed person has authority.

4.2(c) *What are the legal requirements for making a disclosure to a prescribed person?*

Under s 7 of the 2014 Act, a worker can make a protected disclosure to a prescribed person. A person can be prescribed by the Minister for Public Expenditure and Reform ('Minister') by reason of the nature of their responsibilities or functions to be the recipients of certain disclosures.⁶³² In order to make a protected disclosure under s 7, there is a higher evidential burden than a disclosure under s 6 of the 2014 Act to an employer or other responsible person, under s 8 to a Minister, and under s 9 to a legal adviser, in that the worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true. Further, in making the disclosure to a prescribed person under s 7 of the 2014 Act, the worker must reasonably believe that the relevant wrongdoing falls within the description of matters in respect of which the person is prescribed. In order to assist a worker in this regard, there is a corresponding list in the prescribed persons' SIs to the list of prescribed persons setting out matters in respect of which the person is prescribed.

The person to whom the disclosure is made must be prescribed by the date of the dismissal or penalisation in order for the disclosure to the prescribed person to be protected.⁶³³ The reasonable belief test does not qualify the requirement in s 7(1)(a) that the person to whom the disclosure is made is prescribed.⁶³⁴ Hence, in order for the worker's disclosure to be protected the worker must make their disclosure to the correct prescribed person. It is therefore essential that the list of prescribed persons in the prescribed persons' SIs is up-to-date and comprehensive in order to ensure that the worker can make their disclosure to the correct prescribed person.

In relation to the requirement that the worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true, the information disclosed and any allegation contained in it does not have to be substantially true, all that is required is that the worker *reasonably believes* that they are substantially true. In *Korashi v Abertawe*

⁶³² Protected Disclosures Act 2014, s 7(2).

⁶³³ See: UK Court of Session decision: *Miklaszewicz v Stolt* [2001] IRLR 656 (CS) [19].

⁶³⁴ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 5.58.

*Bro Morgannwg University Local Health Board*⁶³⁵ the UKEAT held that since the test is the worker's 'reasonable' belief, that belief must be subject to what a person in their position would reasonably believe to be a wrongdoing.⁶³⁶ Further, the UKEAT held that both the information and the allegation must be substantially true. It was deemed to be insufficient to show that the gist of the matter complained of was believed to be substantially true when a number of other allegations were not so believed. Judge Mc Mullen stated that:

[O]nce one goes outside the immediate confines of the employment relationship and to an outsider ... additional layers of responsibility are required upon the discloser. The information must in the reasonable belief of the discloser be substantially true. There is no obligation to make allegations but if they are made they too must in the reasonable belief of the discloser be substantially true. Both information and allegations must fit that criterion. Here on the facts found by the Tribunal they did not. If we were required to decide this matter it would not be sufficient to show that a matter was believed to be substantially true when a number of the allegations were not so believed.⁶³⁷

The UK Court of Appeal has emphasised that there is no rigid dichotomy between 'information' and 'allegation'.⁶³⁸ Information is capable of covering statements that might also be characterised as allegations, but not every statement involving an allegation will constitute information.⁶³⁹ What is required for the disclosure to constitute a protected disclosure is that it has 'a sufficient factual content and specificity such as is capable of tending to show' a relevant wrongdoing⁶⁴⁰ and this should be assessed in light of the particular context in which it is made.⁶⁴¹ Lewis and Bowers suggest that it is not necessary for there to be a narrow approach to what constitutes information and that 'information' may encompass an implicit statement of belief or opinion and that the 'evaluation of whether that, either by itself or together with other matters disclosed, is sufficient to sustain the requisite reasonable belief will need to be made having regard to all the circumstances.'⁶⁴² They argue further that the subjective belief of a relevant wrongdoing may be shown to be reasonable

⁶³⁵ *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 (EAT).

⁶³⁶ *ibid* [62].

⁶³⁷ *ibid* [66].

⁶³⁸ *Kilraine v London Borough of Wandsworth* [2018] IRLR 846 (CA) [30], clarifying the confusion arising from the UKEAT decision in *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] ICR 325 (EAT).

⁶³⁹ *ibid* [30]-[31].

⁶⁴⁰ *ibid* [35].

⁶⁴¹ *ibid* [41].

⁶⁴² Jeremy Lewis and John Bowers, 'Whistleblowing to No Avail: Protected Disclosures Post *Kilraine v Wandsworth LBC*' (2018) 47(4) *Industrial Law Journal* 567, 581.

by reference to a different wrongdoing or on different grounds to those that the worker had in mind at the time that they made their disclosure, ie an ex post facto justification.⁶⁴³

4.2(d) *What persons are prescribed and who should be prescribed under s 7 of the 2014 Act?*

Under the prescribed persons' SIs, there are purportedly 102 persons prescribed for the purpose of receiving disclosures under s 7 of the 2014 Act. These prescribed persons consist of seventy-one regulatory and supervisory bodies and thirty-one local authorities. The research uncovered that of the 102 prescribed persons, ten of the prescribed persons have either been dissolved, had a change of name, have merged, or had their functions transferred to another organisation.⁶⁴⁴

These anomalies in the list of prescribed persons need to be rectified. Otherwise a worker who makes a disclosure to an organisation that has not been prescribed will not be protected under s 7 of the 2014 Act, but may be considered a s 10 disclosure, which attracts onerous conditions.

Also, there are some notable omissions from the list of prescribed persons, which means that there may not be an appropriate recipient designated in relation to a particular type of wrongdoing.⁶⁴⁵ For example, the Irish Human Rights and Equality Commission ('IHREC')

⁶⁴³ *ibid* 581-582. This argument is premised on the approach taken in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731 (CA) [29] where the Court of Appeal held that the reasonableness of a worker's belief that their disclosure was made in the public interest can be established by reference to factors that the worker did not have in mind at the time when they made their disclosure.

⁶⁴⁴ These ten prescribed persons are as follows: (i) Two prescribed persons, the Opticians Board and the Health and Social Care Professional Council have been replaced by CORU in October 2015; (ii) The functions of the Commissioners of Charitable Donations and Bequests for Ireland, a prescribed person, have been taken on by the Charities Regulatory Authority in 2014; (iii) The prescribed person, the Dublin Docklands Authority, was dissolved on 1 March 2016; (iv) The prescribed person, the Commission for Energy Regulation ('CER') changed its name in 2017 to the Commission for Regulation Utilities ('CRU'); (v) The Competition and Consumer Protection Commission ('CPCC') was established on 31 October 2014 when the two prescribed persons, the Competition Authority and the National Consumer Agency, were amalgamated; (vi) The prescribed person, the National Employment Rights Authority ('NERA') was subsumed into the Workplace Relations Commission in October 2015; and (vii) Transport Infrastructure Ireland was established as a result of the merger of the two prescribed persons, the National Roads Authority ('NRA') and the Railway Procurement Agency ('RPA') under the Roads Act 2015, effective from 1 August 2015.

⁶⁴⁵ Similar research undertaken in the UK also identified a number of national regulators who were not prescribed without any justification, as well as anomalies in the online list of prescribed persons maintained by the Department for Business, Energy and Industrial Strategy: Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2015) 35 *Legal Studies* 408, 416; Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 6-7 *Middlesex University Erepository*; David Lewis and Arron Laverty, 'A Survey of Information about Whistleblowing provided on the Websites of Persons Prescribed under Part IVA Employment Rights Act 1996' (May 2011) 3 *Middlesex University Erepository*; David Lewis, 'A survey of whistleblowing/confidential

was established in 2014 and is Ireland’s national human rights and equality institution. It is an independent public body that accounts directly to the Oireachtas and whose functions include protecting and promoting human rights and equality; encouraging the development of a culture of respect for human rights, equality, and intercultural understanding in the State; and promoting understanding and awareness of the importance of human rights and equality in the State.⁶⁴⁶ The IHREC has the power to carry out an inquiry into ‘a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or a systemic failure to comply with human rights or equality of treatment obligation’⁶⁴⁷ and where certain other conditions are satisfied and would, therefore, be an appropriate recipient of disclosures under s 5(1)(a),(b) and (g) of the 2014 Act.

Another example of an omission from the list of prescribed persons is the Charities Regulatory Authority (‘CRA’). The CRA was established under the Charities Act 2009 (‘2009 Act’) to both register and regulate charities operating in Ireland, as well as to carry out investigations in accordance with the 2009 Act.⁶⁴⁸ The CRA is already tasked with receiving information of offences under the 2009 Act;⁶⁴⁹ offences under the Criminal Justice (Theft and Fraud Offences) Act 2001;⁶⁵⁰ and of non-compliance with the provision of the 2009 Act.⁶⁵¹ Additionally, as the functions of the Commissioners of Charitable Donations and Bequests for Ireland, a prescribed person, have been taken on by the CRA, this underscores their suitability as a prescribed person. A further omission is the Legal Services Regulatory Authority (‘LSRA’), established in October 2016, and tasked with regulating the provision of legal services by legal practitioners.⁶⁵² Complaints against the legal profession are currently dealt with by the Law Society, the Solicitors Disciplinary Tribunal, and the Barristers’ Professional Conduct Tribunal, but the LSRA will replace these and will deal with all complaints⁶⁵³ when it is fully operational.⁶⁵⁴

reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998’ (2007) Communications Law 125, 126.

⁶⁴⁶ Irish Human Rights and Equality Commission Act 2014, s 10(1)(a), (b) and (c).

⁶⁴⁷ *ibid* s 35(1)(a)(1) and (ii).

⁶⁴⁸ Charities Act 2009, s 14.

⁶⁴⁹ *ibid* ss 27, 59, and 61(a).

⁶⁵⁰ *ibid* s 61(c).

⁶⁵¹ *ibid* s 61(b).

⁶⁵² Legal Services Regulation Act 2015, s 13.

⁶⁵³ *ibid* pt 6.

⁶⁵⁴ Shane Phelan, ‘New legal regulator to probe complaints by summer 2019’ *Irish Independent* (Dublin, 2 May 2018) <www.independent.ie/irish-news/courts/new-legal-regulator-to-probe-complaints-by-summer-2019-36864827.html> accessed 6 November 2018.

The Health Service Executive ('HSE') should also be prescribed under the 2014 Act in relation to disclosures from s 38 and s 39 funded agencies.⁶⁵⁵ Currently, the HSE can receive complaints⁶⁵⁶ from a service user in relation to any action of the HSE or a service provider that does not accord with fair and sound administrative practice, and adversely affects or affected that person.⁶⁵⁷ Further, the HSE can receive protected disclosures, not only under the 2014 Act from workers, but also under the Health Act 2004⁶⁵⁸ from employees of a relevant body,⁶⁵⁹ employees of a person carrying on the business of a designated centre other than a centre operated by a relevant body,⁶⁶⁰ or an employee of a person providing mental health services other than a relevant body.⁶⁶¹ Therefore, the HSE is receiving protected disclosures from workers under both the 2014 regime and from employees in s 38 and s 39 funded agencies under the Health Acts. It is recommended that the HSE be prescribed in relation to disclosures from s 38 and s 39 funded agencies in order to align the two statutory protected disclosures regimes under the Health Acts and the 2014 Act. Arguably, the Garda Síochána should also be a prescribed person. Currently, disclosures to the Garda Síochána are s 10 disclosures, which contains onerous conditions in order to attract the protections under the 2014 Act. It is recommended that disclosures to the Garda Síochána should attract a lower threshold for protection as the Garda Síochána are appropriate recipients of disclosures under s 5(3)(a) in respect of a criminal offence, and it is in the public interest that disclosures of that nature would be made to the Garda Síochána.⁶⁶² Another suggested prescribed person would be members of Dáil Éireann or Seanad Éireann. In March 2014, Members of Parliament ('MPs') in the UK were added to the list of prescribed persons. It has been recognised that prescribing MPs in this manner has two benefits: (i) it assists workers who do not know to whom to make their disclosure to qualify for legal protection;

⁶⁵⁵ A s 38 agency is an agency that is funded to provide a defined level of service on behalf of the HSE. A s 39 agency is an agency that receives grant aid from the HSE. Employees of s 38 agencies are public servants and are subject to the standard salary scales for health sector employees. Employees of s 39 agencies are not public servants. For more information on s 38 and s 39 agencies, see: Department of Public Expenditure and Reform, 'Distinction between Section 38 and Section 39 agencies' (DPER).

⁶⁵⁶ Health Act 2004, pt 9.

⁶⁵⁷ *ibid* s 46.

⁶⁵⁸ *ibid* pt 14, as amended by Health Act 2007.

⁶⁵⁹ *ibid* s 55B, as inserted by Health Act 2007, s 103.

⁶⁶⁰ *ibid* s 55C, as inserted by Health Act 2007, s 103.

⁶⁶¹ *ibid* s 55C, as inserted by Health Act 2007, s 103.

⁶⁶² Protect's Whistleblowing Commission in the UK suggested that s 43F of the Employment Rights Act 1996 is amended to include all statutory bodies, which would result in 'organisations such as the police being listed' as a prescribed person. Protect, 'The Whistleblowing Commission, The report of the Whistleblowing Commission on the effectiveness of existing arrangements for workplace whistleblowing in the UK' (Protect November 2013) para 99.

and (ii) it helps ensure that the alleged wrongdoing is looked into by the relevant regulator.⁶⁶³ The explanatory memorandum to The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014⁶⁶⁴ in the UK provides that ‘MPs are often well placed to make representations on behalf of whistleblowers, including to regulatory agencies of the kind that already feature in the 1999 Order.’⁶⁶⁵ Currently in Ireland, a disclosure to members of Dáil Éireann (other than Ministers) or Seanad Éireann is considered to be a s 10 disclosure under the 2014 Act and therefore attracts the cumbersome conditions associated with such disclosures. Prescribing such persons under s 7 of the 2014 Act would be following best practice as established in the UK where it was recognised that whistleblowers should be able to ‘talk freely to their Member of Parliament’ without having to satisfy cumbersome conditions.⁶⁶⁶

In a similar vein, there are persons prescribed whose description of matters in respect of which they are prescribed is deficient. For example, members of the Garda Síochána Ombudsman Commission (‘GSOC’) are prescribed in relation to ‘All matters relating to the functions performable by the Commission under Part 3 of the Garda Síochána Act 2005’.⁶⁶⁷ This provision, however, does not cover disclosures relating to security, defence, international relations, and intelligence. This omission is because s 18(3)(a) and (b) of the 2014 Act provides that disclosures of information relating to security, defence, international relations, and intelligence are not protected unless they are made in the manner specified in ss 6(1)(a), 8, 9 or, to the Disclosures Recipient and the requirements of s 10 of the 2014 Act are met. In response to the invitation in the ‘Statutory Review of the Protected Disclosures Act 2014’ (‘DPER Statutory Review’)⁶⁶⁸ to make submissions on the 2014 Act, GSOC

⁶⁶³ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing Framework Call for Evidence, Government Response’ (BEIS June 2014) 12.

⁶⁶⁴ The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014, SI 2014/596.

⁶⁶⁵ Explanatory Memorandum to The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014, SI 2014/596, para 7.2.

⁶⁶⁶ Public Interest Disclosure (Amendment) Bill Deb 19 November 2013, cols 1117-1119. It has been recognised that this Ten Minute Rule Bill, sponsored by the Rt Hon David Davis MP, inspired the inclusion of prescribed persons as MPs. Commons Briefing Paper, ‘Whistleblowing to MPs, Briefing Paper’ (House of Commons Library 17 April 2014) 4.

⁶⁶⁷ Protected Disclosures Act 2014 (s 7(2)) Order 2014, SI 2014/339.

⁶⁶⁸ As discussed in Chapter 3, the ‘Statutory Review of the Protected Disclosures Act 2014’ was commenced by DPER under s 2 of the 2014 Act in August 2017 and was published 11 July 2018. Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018).

submitted that there should be an amendment made to the 2014 Act to enable it to investigate such disclosures.⁶⁶⁹

4.3 Are protected disclosures being made to prescribed persons?

4.3(a) *Introduction*

An assessment was undertaken of the number of disclosures being made to prescribed persons between 2014-17. In order to determine whether disclosures are being made to prescribed persons, data were assessed from: (i) the case law analysis undertaken in Chapter 3; (ii) from the prescribed persons' annual reports that have been published; and (iii) from the prescribed persons' survey responses.

4.3(b) *Data from case law research*

According to the findings of the case law analysis undertaken in Chapter 3, none of the cases concerned a disclosure to a prescribed person in the first instance. In twelve (39%) of the cases where the disclosure was made internally in the first instance, the disclosure was subsequently made externally. Of those cases, the disclosure was made to a prescribed person under s 7 of the 2014 Act in five cases (which equates to 42% of the cases where the disclosure was made externally). In three of the cases, the disclosure was made to Health Information Quality Authority ('HIQA'),⁶⁷⁰ one case concerned a disclosure to the Health and Safety Authority ('HSA'),⁶⁷¹ and in one case, the disclosure was made to Revenue.⁶⁷²

4.3(c) *Data from annual reports*

Under s 22 of the 2014 Act, every public body is obliged to prepare and publish a report by 30 June each year detailing the number of protected disclosures made to it in the immediately preceding year and any action taken in response to those protected disclosures. The annual report must be in such a form that it does not enable the identification of the person involved in the matters included in the report.⁶⁷³ A similar obligation was introduced in the UK in

⁶⁶⁹ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁶⁷⁰ *Monaghan v McGrath Partnership* r-151162-pd-1415R; *Carroll v Congregation of the Holy Spirit T/A Registered Charity Chy 076 UD 981/2015*; *An Employee v A Nursing Home* ADJ-00000456.

⁶⁷¹ *An Employee v An Employer* ADJ-00000258.

⁶⁷² *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC).

⁶⁷³ Protected Disclosures Act 2014, s 22.

2017.⁶⁷⁴ Certain prescribed persons in the UK⁶⁷⁵ are required to report in writing on disclosures that it has received from workers in the designated reporting period, which is twelve months beginning on 1 April of each year.⁶⁷⁶ Within six months of the end of the reporting period, the prescribed person's annual report must be placed on its website or published in a manner that the prescribed person considers appropriate for bringing the report to the public's attention.⁶⁷⁷

The purpose and impact of annual reporting are manifold. As the UK BEIS guidance for prescribed persons states:

The aim is to increase transparency in the way that whistleblowing disclosures are dealt with and to raise confidence among whistleblowers that their disclosures are taken seriously. Producing reports highlighting the number of disclosures received and how they were taken forward will go some way to assure individuals who blow the whistle that action is taken in respect of their disclosures.⁶⁷⁸

Thus, the reports are an opportunity for prescribed persons to clarify the expectations that workers have when making their disclosures to prescribed persons.⁶⁷⁹ Also, annual reporting obligations ensure that there are systematic processes in respect of how prescribed persons handle disclosures. Therefore, this reporting obligation should result in a consistent standard of best practice for prescribed persons in how they should handle disclosures.⁶⁸⁰ According to the responses to the UK prescribed bodies' annual reporting requirements on whistleblowing consultation undertaken in 2014, 55% of respondents believed that a duty to report annually would both encourage consistency across prescribed persons and improve transparency, whilst 65% believed that it would increase confidence in prescribed persons and the way in which they handled disclosures.⁶⁸¹

⁶⁷⁴ The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507.

⁶⁷⁵ *ibid* reg 2, provides that the obligation to publish annual reports on disclosures of information applies to prescribed persons, other than: a member of the House of Commons; a Minister of the Crown; a Welsh Minister; A Scottish Minister; the European Securities and Markets Authority; and an auditor appointed to audit smaller authorities.

⁶⁷⁶ *ibid* reg 3(1)-(2).

⁶⁷⁷ *ibid* reg 4.

⁶⁷⁸ Department for Business, Energy and Industrial Strategy, 'Whistleblowing, Prescribed Persons Guidance' (BEIS March 2015) 7.

⁶⁷⁹ Department for Business, Energy and Industrial Strategy, 'Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response' (BEIS March 2015) 20.

⁶⁸⁰ Department for Business, Energy and Industrial Strategy, 'Small Business, Enterprise and Employment Bill, Prescribed persons: annual reporting requirements on whistleblowing' (BEIS August 2014) 4.

⁶⁸¹ Department for Business, Energy and Industrial Strategy, 'Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response' (BEIS March 2015) 18.

The first issue assessed in this research in relation to the issue of prescribed persons' annual reports was whether prescribed persons are complying with their statutory obligation to publish annual reports and the second issue assessed was whether protected disclosures are being made to prescribed persons, and if so, how many have been made?

4.3(c)(i) Are prescribed persons complying with their statutory obligation to publish annual reports?

With respect to the first issue, the compliance rate of ninety-two prescribed persons was assessed. Ninety-two prescribed persons were assessed because ten of the prescribed persons were either dissolved, merged, or had their functions transferred to another organisation. However, one of those ten prescribed persons, CORU,⁶⁸² was included in the assessment as it is holding itself out as a prescribed person as it has published Procedures to receive disclosures as a prescribed person. Further, although CER changed its name to CRU, this body was included in the assessment as it stated on its website that it is a prescribed person and therefore it was deemed appropriate to include its annual report in the assessment. The annual report of the prescribed person, the National Standards Authority of Ireland, included information on the Legal Metrology Service, also a prescribed person, and therefore the annual report for both prescribed persons was treated as a single report. Also, the annual report of the prescribed person, the Registry of Companies, also concerned the prescribed person, the Registry of Friendly Societies, and therefore the annual report for both were treated as a single report.

Of the ninety-two prescribed persons included in this assessment, 28% (twenty-six) did not publish an annual report, 51% (forty-seven) demonstrated partial reporting compliance, and 21% (nineteen) had full compliance (ie published three annual reports).⁶⁸³ With regard to the rates of partial compliance, 34% (thirty-one) of prescribed persons had one annual report, whilst 17% (sixteen) of prescribed persons published two annual reports.

⁶⁸² CORU replaced the Opticians Board and the Health and Social Care Professional Council.

⁶⁸³ See: Appendix 4(a), 'Prescribed Persons' Annual Reports' Data' for the compliance rate of each prescribed person. The assessment of the annual reports covered the reporting period from 2014 until 2017 as the research to locate the annual reports was undertaken on 15 and 16 January 2018 and the deadline for responding to the prescribed persons' survey was 1 May 2018. As the deadline for publishing the 2018 report was 30 June 2018, not all prescribed persons would have published its report by the survey deadline, and as the survey responses and the annual reports were to be assessed in tandem, it was considered appropriate to limit the assessment to the 2014-17 annual reports.

From the assessment, it is clear that prescribed persons have some difficulty in complying with their statutory obligation under s 22 of the 2014 Act to publish annual reports. Firstly, the low rate of full compliance with s 22 indicates either a lack of awareness of the obligation to publish annual reports or an indifference to that obligation on the basis that there is no accountability provision included in s 22 in the event of non-compliance. Secondly, there appears to be a miscomprehension of the timeframe that the annual report is meant to cover. Section 22 of the 2014 Act requires that the annual report details the number of protected disclosures made to it in the ‘immediately preceding year’. Nonetheless, there appeared to be only four prescribed persons that understood this requirement and complied fully with it.⁶⁸⁴ Thirdly, in the vast majority of cases, prescribed persons are publishing their reports in such a manner that it is unclear whether the disclosure is being made to it in its capacity as a prescribed person or as an employer. Only eleven prescribed persons made this distinction clear. Eight prescribed persons categorised the disclosures into disclosures received either as an employer, as a prescribed person, or under s 10 of the 2014 Act,⁶⁸⁵ whilst two prescribed persons specifically stated that the disclosures were solely received in their role as prescribed persons,⁶⁸⁶ and one indicated that the disclosures were received solely in its capacity as the employer.⁶⁸⁷ The HIQA report was in excess of its reporting requirements under the 2014 Act and stated in its 2016 annual report that 1,334 disclosures were received from staff, people who use services, and the general public. Therefore, it is impossible to discern in what capacity disclosures were received by HIQA under the 2014 Act.

According to the survey responses, three prescribed persons indicated that they did not know if their annual report under s 22 of the 2014 Act includes disclosures received as a prescribed person, whilst two of those prescribed persons also did not know if their annual report under s 22 of the 2014 Act includes disclosures received as an employer. Further, five prescribed persons indicated in the survey that their annual reports under s 22 of the 2014 Act did not include disclosures received as a prescribed person or as an employer. These responses

⁶⁸⁴ Central Bank; Data Protection Commission; Communications Regulation; Limerick City and CC. The requirement to publish an annual report that details the number of protected disclosures made to it in the ‘immediately preceding year’ requires that the 2015 report covers disclosures from 15 July 2014 to 29 June 2015; the 2016 report covers disclosures from 30 June 2015 to 29 June 2016; and the 2017 report covers disclosures from 30 June 2016 to 29 June 2017.

⁶⁸⁵ Comptroller and Auditor General; Data Protection Commission; Higher Education Authority; Irish Aviation Authority; Pharmaceutical Society of Ireland; Revenue; Teaching Council; Veterinary Council of Ireland.

⁶⁸⁶ Health and Safety Authority; ODCE.

⁶⁸⁷ Private Residential Tenancies Board.

highlight a clear concern that prescribed persons do not understand their reporting obligations or the content of their reports.

4.3(c)(ii) *Are disclosures being made to prescribed persons? If so, how many have been made?*

With regard to the second issue of whether disclosures are being made to prescribed persons and if so how many have been made, this could only be assessed in relation to the annual reports that have been published. Of those prescribed persons who published annual reports, and considering the totality of disclosures, the following results were identified:

Table 4.1 Number and rate of disclosures received by prescribed persons: annual reports (n=66)

Number of disclosures received	Number of prescribed persons	Percentage⁶⁸⁸
0	43	65%
1	8	12%
2	6	9%
3	1	1.5%
5	1	1.5%
7	1	1.5%
8	1	1.5%
14	1	1.5%
16	1	1.5%
24	1	1.5%
124	1	1.5%
2509	1	1.5%

⁶⁸⁸ This is the percentage of disclosures received by the prescribed persons who had published annual reports.

Thus, of the sixty-six prescribed persons who have published annual reports, twenty-three prescribed persons (35%) reported receiving protected disclosures. This finding can be contrasted with the data obtained by Savage and Hyde in their study of disclosures received by twenty-five prescribed persons in the UK between 2005 and 2010 where sixteen regulators (64%) reported receiving disclosures and nine (36%) reported receiving no disclosures.⁶⁸⁹ The Savage and Hyde study, however, concerned a lower number of prescribed persons and covered a longer period than this study and therefore cannot be entirely comparable. The largest number of disclosures received by a prescribed person in Ireland was by HIQA who reported that it had received 2509 disclosures. However, its annual reports included disclosures from a range of persons outside of the scope of the 2014 Act and therefore the disclosures reported could not all constitute a protected disclosure under the 2014 Act. Therefore, the highest number of disclosures reported was 124 disclosures in the financial services sector to the Central Bank. There has been a year-on-year increase in the number of disclosures received by the Central Bank, with only 1 in 2015, 44 in 2016, and 79 in 2017.

One factor to be taken into consideration when assessing this high rate of disclosures received by the Central Bank is that the Central Bank was only one of nineteen prescribed persons that had published three annual reports, and therefore, the more annual reports that are published, it is expected that this would reveal a higher number of disclosures than those prescribed persons who have either partial compliance or no compliance. Another factor to be taken into consideration is that the Central Bank can receive disclosures under a number of pieces of legislation in addition to the 2014 Act, eg Central Bank (Supervision and Enforcement) Act 2013⁶⁹⁰ and European Union (Single Supervisory Mechanism) Regulations 2014.⁶⁹¹ Further, a significant factor to be considered is that under European

⁶⁸⁹ Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2015) 35 *Legal Studies* 408, 420. Further, in a 2007 study of prescribed persons' internal procedures in the UK, out of twenty-one respondents, seven (33%) indicated that their procedures had been invoked and six (29%) stated that it had been used on twenty or more occasions. David Lewis, 'A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998' (2007) *Communications Law* 125, 128.

⁶⁹⁰ Central Bank (Supervision and Enforcement) Act 2013, pt 5 and s 38.

⁶⁹¹ European Union (Single Supervisory Mechanism) Regulations 2014, SI 2014/495, giving full effect to Council Regulation (EC) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013], art 23; and European Central Bank Regulation (EC) 468/2014 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1, arts 36-38.

Parliament and Council Regulation 596/2014 on market abuse⁶⁹² the Central Bank is obliged to establish effective mechanisms to enable reporting of actual or potential market abuse.⁶⁹³ These effective mechanisms include having specific procedures for: (i) the receipt and follow-up of infringement reports, including establishing secure communication channels for such reports;⁶⁹⁴ (ii) providing appropriate protections to persons working under a contract of employment who make the report and to persons accused of the infringement;⁶⁹⁵ and (iii) protecting the personal data of both the discloser and the alleged infringer.⁶⁹⁶ The rules for these procedures are laid down in Commission Implementing Directive 2015/2392/EC⁶⁹⁷ and are given effect nationally in the European Union (Market Abuse) Regulations 2016 ('2016 Regulations').⁶⁹⁸ Amongst other obligations, the 2016 Regulations require the Central Bank to establish independent and autonomous communication channels, which are both secure and ensure confidentiality, for receiving and following up on infringements.⁶⁹⁹ The Central Bank is required to publish information on these communication channels in a separate, easily identifiable, and accessible section of its website.⁷⁰⁰ This requirement includes information for contacting the dedicated staff members who are trained to handle infringement reports.⁷⁰¹ Further, a clear outline of the infringement reporting procedures

⁶⁹² European Parliament and Council Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁶⁹³ *ibid* art 32(1).

⁶⁹⁴ *ibid* art 32(2)(a).

⁶⁹⁵ *ibid* art 32(2)(b).

⁶⁹⁶ *ibid* art 32(2)(c).

⁶⁹⁷ Commission Implementing Directive 2015/2392/EC of 17 December 2015 on Regulation (EC) 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation OJ L332/126. The Commission Implementing Directive 2015/2392/EC highlights the importance of publishing information regarding communication channels and states 'Persons intending to report actual or potential infringements of Regulation (EU) No 596/2014 should be able to make an informed decision on whether, how and when to report. Competent authorities should therefore publicly disclose and make easily accessible information about the available communication channels with competent authorities, about the applicable procedures and about the dedicated staff members within the authority dealing with reports of infringements. All information regarding reports of infringements should be transparent, easily understandable and reliable in order to promote and not deter reporting of infringements.' *ibid* Recital 4.

⁶⁹⁸ European Union (Market Abuse) Regulations 2016, SI 2016/349, giving full effect to European Parliament and Council Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, art 32; and giving effect to Commission Implementing Directive 2015/2392/EC of 17 December 2015 on Regulation (EC) 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation OJ L332/126.

⁶⁹⁹ *ibid* reg 18.

⁷⁰⁰ *ibid* reg 16(a). This information includes '(i) the phone numbers, indicating whether conversations are recorded or unrecorded when using those phone lines, and (ii) dedicated electronic and postal addresses, which are secure and ensure confidentiality, to contact the dedicated staff members'.

⁷⁰¹ *ibid*. Regulation 15 of SI 2016/349 provides that dedicated staff members perform the following functions: '(a) providing any interested person with information on the procedures for reporting infringements; (b)

must be published,⁷⁰² as well as the applicable confidentiality regime,⁷⁰³ the protection procedures,⁷⁰⁴ and the appropriate immunity statement.⁷⁰⁵

It is also worth noting that the Commission Implementing Directive 2015/2392/EC recommends that anonymous reporting should be allowed by competent authorities.⁷⁰⁶ The 2016 Regulations has adopted this and provides that the procedures applicable to the reports of infringement should clearly indicate that reports of infringements may be submitted anonymously.⁷⁰⁷

Therefore, taking all of the factors outlined into consideration, this goes some way to explaining the significant number of disclosures reported by the Central Bank as having been received by it. Other prescribed persons may not have the range of legislative disclosure provisions applicable to them other than under the 2014 Act. In addition, under the 2014 Act, prescribed persons are only required to provide workers employed by it with written information in relation to its Procedures, they are not required to provide information to workers in relation to their role as a prescribed person under the 2014 Act.⁷⁰⁸ The obligation on the Central Bank to provide information publicly may explain the higher rate of disclosures received by it than by other prescribed persons as it has made the process transparent and accessible. Further, the active promotion of anonymous disclosures by the Central Bank under their market abuse reporting scheme may also explain the high rate of disclosures received by it as this is an attractive option for workers seeking to make a disclosure.⁷⁰⁹

4.3(d) *Data from survey responses*

receiving and following up on reports of infringements; (c) maintaining contact with the reporting person where that person has identified himself or herself.’

⁷⁰² *ibid* reg 16(b).

⁷⁰³ *ibid* reg 16(c).

⁷⁰⁴ *ibid* reg 16(d).

⁷⁰⁵ *ibid* reg 16(e).

⁷⁰⁶ Commission Implementing Directive 2015/2392/EC of 17 December 2015 on Regulation (EC) 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation OJ L332/126 Recital 4 and art 5(1)(a).

⁷⁰⁷ European Union (Market Abuse) Regulations 2016, SI 2016/349, reg 17.

⁷⁰⁸ There is an obligation on prescribed persons in the UK to include in their annual report that is placed on its website, an explanation of the functions and objectives of the relevant prescribed person. The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507, reg 5(d).

⁷⁰⁹ The issue of anonymous disclosures is discussed in detail in Chapter 5.

Ninety-six prescribed persons were invited to participate in a survey⁷¹⁰ from 5 April 2018 until 1 May 2018. The survey was sent to ninety-six prescribed persons instead of the designated 102 prescribed persons because five prescribed persons have either been dissolved or merged into another prescribed person and one organisation used the same website and contact details as another prescribed person. However, included in the ninety-six prescribed persons were: (i) CRU, despite having changed its name from CER in 2017; (ii) CORU, which replaced both the Opticians Board and the Health & Social Care Professional Council; (iii) the CRA which had taken over the functions of the Commissioners of Charitable Donations in 2014; (iv) the CPCC, which was established on 31 October 2014 when the Competition Authority and the National Consumer Agency, were amalgamated; and (v) Transport Infrastructure Ireland, which was established as a result of the merger of the two prescribed persons, the National Roads Authority and the Railway Procurement Agency under the Roads Act 2015. It was considered appropriate to include these organisations in the survey in order to determine whether they are acting as prescribed persons under the 2014 Act irrespective of the anomalies regarding their prescription under the prescribed persons' SIs. Despite the inclusion of CRU, CORU, CRA, CPCC, and Transport Infrastructure Ireland, none of these organisations responded to the survey. This failure to respond may indicate that they are not acting as prescribed persons or they simply decided not to respond to the survey. It is not possible to determine the reason for the non-response. However, it must be noted that both CORU and CRU have Procedures available for receiving disclosures in their capacity as a prescribed person.

Twenty prescribed persons completed the survey, which equates to a 21% response rate.⁷¹¹ Of those who completed the survey, ten of the respondents were local authorities, and ten were regulatory bodies. The low response rate means that the findings can only be illustrative

⁷¹⁰ See: Appendix 2(b), 'Protected Disclosures Prescribed Person Survey'. The purpose of the survey was set out in the cover letter and explained that 'The purpose of this survey is to determine whether the Protected Disclosures Prescribed Person system is working properly. In order for the system to be effective, prescribed persons need to know and understand what is required of them to carry out their role. It is hoped that an analysis of the data from the survey will assist me in making recommendations for improvements of the Protected Disclosures Prescribed Person system.' See: Appendix 2(a), 'Prescribed Persons' Survey Cover Letter'.

⁷¹¹ See: Appendix 2(c), 'Default Report Protected Disclosures Prescribed Person Survey'. Thirty-two surveys were commenced, which equates to 33% of the prescribed persons invited to participate in the survey. There were twenty-six recorded responses, which is an 81% completion rate of those who started the survey and 28% of the overall number of prescribed persons invited to participate in the survey. Of the twenty-six recorded responses, five were deemed a 'false' finish, although two of those surveys were included in the default report generated by Qualtrics as some of the questions were answered by the respondents therein. Three of the twenty-six recorded responses were designated as a 'true' finish but none of the survey questions were answered in those three surveys.

as opposed to representative. The response rate to the survey can be compared to similar research conducted in the UK where there was a response rate of 58% (twenty-six replies) to a survey sent to forty-five prescribed persons in November 2005.⁷¹² In a 2013 UK study, there was a response rate of 78% (forty-two replies) to a survey sent to fifty-four prescribed persons.

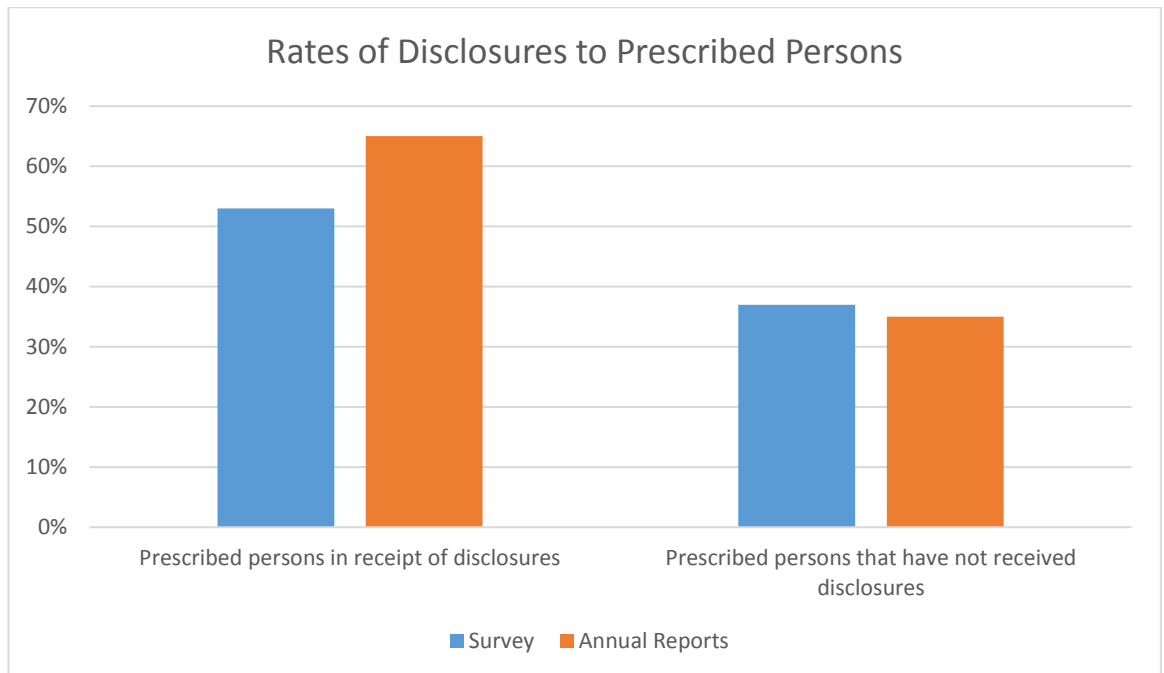
In contrast to the 2005 and 2013 surveys in the UK, the survey for the purpose of this research was administered to a larger number of prescribed persons who were given a shorter period within which to complete the survey. In the 2005 study, the participants were given from November 2005 to end of February 2006 to complete the survey, and in the 2013 study, the participants had from 23 February 2013 to 12 May 2013 to complete the survey. For completion of the survey herein, the participants were initially required to complete the survey from 5 April 2018 to 19 April 2018. The deadline for completion of the survey was extended from 19 April 2018 to 1 May 2018 as only thirteen responses had been received by that date. This larger sample size and shorter time from for responding to the survey in this study could explain the lower rates of response than those received in the UK studies.

In respect of the issue of whether disclosures are being made to prescribed persons, nineteen prescribed persons answered question 12 ‘Has your organisation received any alleged protected disclosures?’ In response to this question, seven (37%) of the prescribed persons answered ‘Yes’; ten (53%) answered ‘No’; and two (11%) answered ‘Don’t know’.

These rates are similar to the findings of the annual reports:

⁷¹² David Lewis, ‘A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998’ (2007) Communications Law 125, 126.

Bar Chart 4.1 Rates of disclosures to prescribed persons: survey results and annual report data

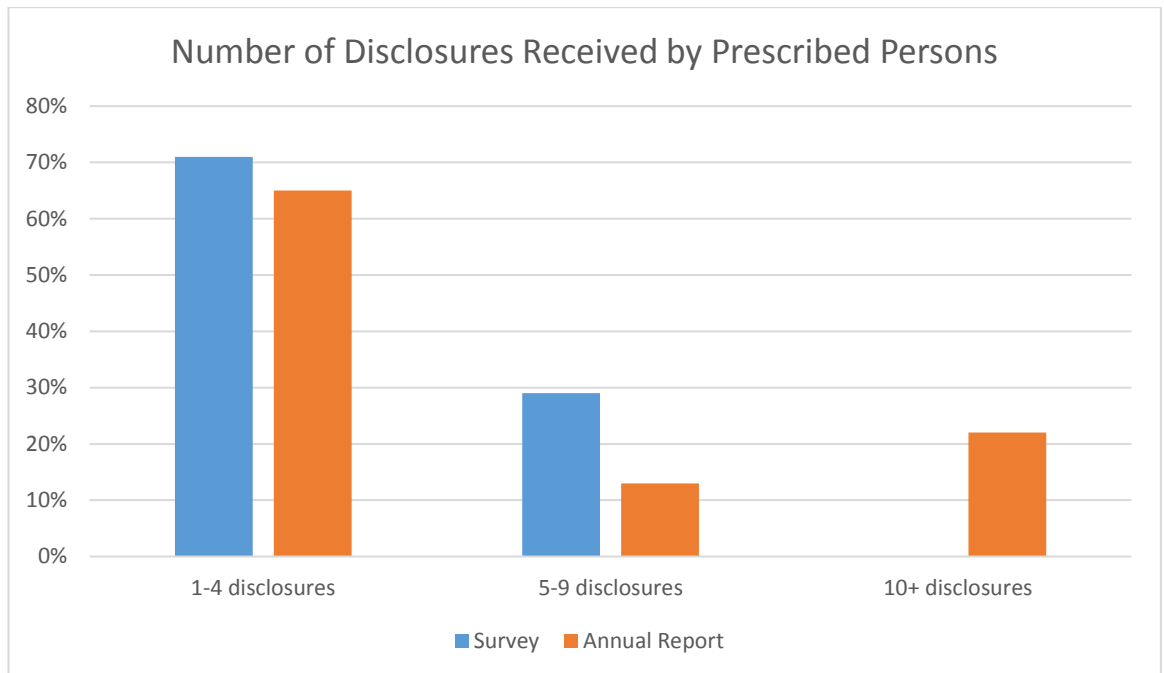


It is surprising that two of the prescribed persons stated that they did not know if they had received a protected disclosure as the cover letter to the survey requested that ‘the most appropriate person in your organisation in relation to protected disclosures completes the survey.’⁷¹³ Therefore, it is either the case that two of those persons were not the ‘most appropriate person’ to complete the survey or that person is the most appropriate person, but they are not carrying out their function appropriately.

With respect to the number of protected disclosures received by the prescribed persons, question 13 asked ‘If you answered ‘yes’ to Q12, approximately how many alleged protected disclosures has your organisation received?’ Five (71%) prescribed persons responded that they had received between ‘1-4’ protected disclosures; two (29%) indicated that they had received between ‘5-9’ protected disclosures; and none answered ‘10+’. These findings can be contrasted with the findings from the annual reports analysis:

⁷¹³See: Appendix 2(a), ‘Prescribed Persons’ Survey Cover Letter’.

Bar Chart 4.2 Number of disclosures received by prescribed persons: survey results and annual report data



Therefore, despite the low response rate to the survey by prescribed persons, the findings in relation to whether disclosures are being made to prescribed persons are similar to those of the annual reports assessment. Thus, as can be seen from both datasets, the majority of prescribed persons have not received protected disclosures, be it in their role as a prescribed person or their role as an employer. Further, of those disclosures that are being made, they tend to fall into the lower bracket (between '1-4') of disclosures, thus indicating that of those organisations that are receiving disclosures, they are not receiving them regularly.

4.4 Do prescribed persons understand their role under the 2014 Act?

4.4(a) *Introduction*

In order for the prescribed persons' system to operate effectively, the core requirement is that the prescribed person understands their role under the 2014 Act. In order to assess whether prescribed persons understand their role, the responses to the prescribed persons' survey were assessed.

4.4(b) *Data from survey responses*

First of all, with respect to the issue of whether the prescribed person is aware that it is prescribed under the 2014 Act, twenty (100%) prescribed persons answered 'Yes' to question 3 of the survey that asked 'Does your organisation perform the function of prescribed person under either Protected Disclosures Act 2014 (s 7(2)) Order 2014, SI 339/2014, Protected Disclosures Act 2014 (Disclosure to Prescribed Persons) Order 2015, SI 448/2015, or Protected Disclosures Act 2014 (Disclosure to Prescribed Persons) Order 2016, SI 490/2016?' This finding indicates a high level of recognition by prescribed persons of their designation under the 2014 Act. This can be contrasted with the UK prescribed persons' study carried out in 2013 where thirty (71%) respondents confirmed that they were prescribed persons, whilst two (5%) said they were not, and ten (24%) failed to specify either way.⁷¹⁴ However, in Ireland, CORU, despite not being prescribed under the prescribed persons' SIs, has published Procedures for receiving disclosures as a prescribed person. Therefore, although the survey indicates a high level of recognition of the being prescribed under the 2014 Act, there is still evidence of some confusion in relation to this.

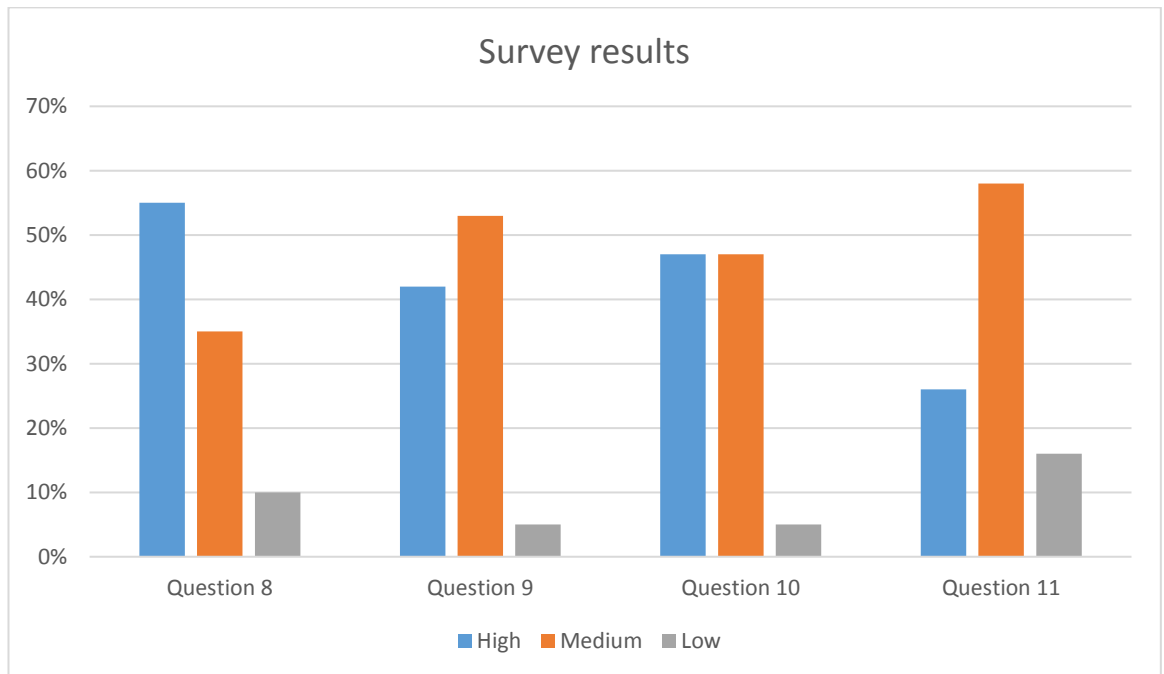
⁷¹⁴ Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 13 Middlesex University Erepository.

Of course, in order to be able to carry out their role, the prescribed person must have a high level of understanding of: (i) the 2014 Act; (ii) the scope of matters in respect of which they are prescribed; and (iii) both their protected disclosures procedures and investigation procedures. In order to assist the researcher in determining prescribed persons' level of understanding of these matters, specific questions were included in the survey in this regard, and prescribed persons were asked to mark their answers as either 'High', 'Medium', or 'Low'.⁷¹⁵

Question 8 of the survey asked 'What is your level of understanding of your protected disclosures procedures?' Question 9 asked 'What is your level of understanding of the provisions of the Protected Disclosures Act 2014?' Question 10 of the survey asked 'What is your level of understanding of the scope of matters in respect of which you are prescribed?' Question 11 asked 'What is your level of understanding of investigation procedures for protected disclosures?' The following responses were recorded for questions 8, 9, 10, and 11:

⁷¹⁵ The use of the terms 'High', 'Medium', and 'Low' means that the responses from prescribed persons are entirely subjective. There was no method of assessing these particular issues in an objective manner. The alternative was to omit the questions that required a 'High', 'Medium', or 'Low' response but this option was rejected on the grounds that it was better to have a subjective response rather than none at all.

Bar Chart 4.3 Prescribed persons' levels of understanding regarding protected disclosures Procedures, the provisions of the 2014 Act, the scope of matters in respect of which they are prescribed, and investigation procedures for protected disclosures



The findings from these four questions indicate that with regard to all four issues, the majority of prescribed person had either a 'High' or a 'Medium' level of understanding. This is somewhat reassuring and demonstrates that prescribed persons are in the main subjectively comfortable with their role under the 2014 Act. This finding is underscored by the responses to question 28, which asked 'How confident are you in carrying out your role as a prescribed person?' The majority of prescribed persons, eleven (61%), indicated that they are 'Somewhat confident' in carrying out their role; followed by six (33%) indicating that they were 'Very confident'; and one (6%) stating that they are 'Not confident'.⁷¹⁶ Nonetheless, some respondents to the survey also indicated that due to either not receiving disclosures or receiving a low number of disclosures that this meant that they could not share what they considered to be good practice as a prescribed person. Question 29 asked 'As a prescribed person, do you have anything to share that could be considered good practice?' One respondent stated that 'Haven't received any protected disclosures to date so limited experience in dealing with same.' Another respondent stated that 'It is difficult to become an expert when no disclosures have been received to learn from and gain experience from'. Such statements demonstrate that despite having a high or medium level of understanding of the issues relating to their role as a prescribed person, or in the majority, feeling 'Somewhat confident' with the role, unless prescribed persons are receiving disclosures and responding to them, they cannot really assess their own understanding of the issues underpinning their role.

In order to assist prescribed persons with their understanding of these issues, it is essential that they receive protected disclosures' training. The issue of training was the subject of question 7 of the survey, which asked 'Did you receive any specific training on protected disclosures?' Ten (53%) prescribed persons indicated that they had received training, whilst nine (47%) said that they had not received training. In the UK, in the study conducted by Lewis on the whistleblowing/confidential reporting procedures used by prescribed persons under the Public Interest Disclosures Act 1998 ('PIDA'), it was identified that nine of the twenty-one respondents (43%) provided training to their managers in how to handle

⁷¹⁶ Again, the use of the terms 'Very confident', 'Somewhat confident', and 'Not confident' means that the responses from prescribed persons are entirely subjective. There was no method of assessing these particular issues in an objective manner. The alternative was to omit the questions that required a 'Very confident', 'Somewhat confident', or 'Not confident' response but this option was rejected on the grounds that it was better to have a subjective response rather than none at all.

concerns.⁷¹⁷ Further, in the UK study carried out by Phillips and Lewis in 2013 on prescribed persons, of the twenty-eight prescribed persons who completed the full questionnaire, 50% had received training in how to perform their role, whilst 50% had not. Of the 50% of organisations who had not received training, nine (64%) indicated that they felt that training would have been beneficial.⁷¹⁸

Lack of training appears to be a key concern of prescribed persons in Ireland. Question 30 in the survey for this study asked ‘Is there anything else you would like to add about your role as a prescribed person?’ Five prescribed persons took this opportunity to comment on their role as a prescribed person, and three of those prescribed persons commented about training. One commented that ‘There should be annual revision training as the disclosures are so infrequent that one forgets the policy and procedure where it only forms a title but is not the substantive duties.’ Another commented that ‘I have recently been appointed to the role of Acting Senior Executive Officer Corporate Services and have been designated as the Protected Disclosures Recipient. I have reviewed the legislation and have a general understanding of the requirements but would need to complete some training and seek specialist advice in the event of receipt of a protected disclosure’. Another prescribed person stated that ‘There should be government-wide standardised training that is offered to all prescribed persons.’

Thus, the findings of the UK and Irish studies are closely aligned. There appears to be a deficit in training for prescribed persons, yet prescribed persons have identified it as being necessary for them to carry out their role. As discussed in Chapter 3, Transparency International Ireland’s (‘TII’) Integrity at Work (‘IAW’) initiative has provided training to a host of public sector organisations,⁷¹⁹ totalling 480 participants. Further, DPER published a ‘Request for Tenders to Establish a Multi-Supplier Framework for the Provision of Training Services under Protected Disclosures Act 2014’ in May 2017. The successful framework

⁷¹⁷ David Lewis, ‘A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998’ (2007) Communications Law 125, 128.

⁷¹⁸ Arron Phillips and David Lewis, ‘Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?’ (October 2013) 13 Middlesex University Erepository.

⁷¹⁹ Department of Justice; National Disability Authority; Policing Authority; Irish Congress of Trade Unions; Action Aid; Valuation Office; Legal Aid Board; Charities Regulator; Courts Service; Probation Service; Garda Síochána; Higher Education Authority; Insolvency Service of Ireland; International Protection Office; Irish Film Classifications Office; Irish Prison Service; Road Safety Authority; Property Registration Authority of Ireland.

members were RSM Ireland and Byrne Wallace Solicitors.⁷²⁰ Also, there is a Professional Certificate in ‘Whistleblowing Law and Practice’,⁷²¹ which commences in January 2019 in University College Dublin,⁷²² and it would be anticipated that those who are tasked with dealing with protected disclosures would avail of this opportunity to maximise their understanding of this area. Thus, there are opportunities for prescribed persons to receive training in protected disclosures, but it needs to be promoted and encouraged.

4.5 Are prescribed persons complying with their obligations under s 21(1) to establish and maintain protected disclosures procedures and under s 21(4) to have regard to the DPER Guidance?

4.5(a) Introduction

Transparency International defines a ‘whistleblowing – or internal reporting – mechanism’ as ‘a set of policies or procedures within an organisation which establish not just effective channels but comprehensive protection and support for reporting persons.’⁷²³ Workplace Procedures are fundamental in order to encourage workers to make disclosures to their employer rather than externally to recipients outside of the organisation. Internal reporting allows employers to respond swiftly to wrongdoing and thus limit any potential damage and it reduces the risk of confidential information being leaked to external recipients.⁷²⁴ Further,

⁷²⁰ ETenders, ‘Contract award notice’ <<https://irl.eu-supply.com/ctm/Supplier/PublicTenders/ViewNotice/195643>> (*Etenders*, 7 September 2017) accessed 30 July 2018.

⁷²¹ University College Dublin, ‘Whistleblowing Law and Practice’ (*UCD*) <www.ucd.ie/law/events/whistleblowinglawandpractice/> accessed 11 December 2018.

⁷²² University College Dublin was ranked 47th globally in the 2019 Times Higher Education World University Rankings table for law subjects. THE World University Rankings, ‘World University Rankings 2019 by subject: law’ (*Times Higher Education*) <www.timeshighereducation.com/world-university-rankings/2019/subject-ranking/law#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats> accessed 11 December 2018.

⁷²³ Transparency International, ‘Internal Whistleblowing Mechanisms Topic Guide’ (TI 28 June 2017) 5.

⁷²⁴ Note that under s 15 of the 2014 Act, making a protected disclosure does not constitute a criminal offence. Further, European Parliament and Council Directive 2016/943/EC of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1 provides in recital 20 that ‘The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive.’ This position is enshrined in art 1(2)(b) where it provides that the Directive does not affect ‘the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities.’ In addition, art 5(b) of the Directive provides that Member States must ‘ensure that an application for the measures, procedures and remedies provided for

implementing protected disclosure Procedures promotes a workplace culture where workers are encouraged to disclose information about wrongdoing in the anticipation that they will not be penalised for having done so. It also encourages workers to come forward with such information in the expectation that action will be taken in response to their disclosure. This should improve the trust, confidence, and morale of workers. It is estimated that 94% of public bodies in Ireland have Procedures in place.⁷²⁵ Unfortunately, however, according to a survey of 353 employers in the private sector in Ireland, only 10% said that they had a whistleblowing policy or guidance.⁷²⁶

The benefits of implementing Procedures are manifold. The DPER Guidance issued under s 21(3) of the 2014 Act provides that establishing Procedures will facilitate the public body to achieve the following:

- (i) Deter wrongdoing in the public service.
- (ii) Ensure early detection and remediation of potential wrongdoing.
- (iii) Reduce the risk of confidential information being leaked.
- (iv) Demonstrate to interested stakeholders, regulators, and the courts that the public body is accountable and managed effectively.
- (v) Improve trust, confidence, and morale of workers in the public body.
- (vi) Build a responsible and ethical organisational culture.

in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases: (a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media; (b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest; (c) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise; (d) for the purpose of protecting a legitimate interest recognised by Union or national law.’ The European Union (Protection of Trade Secrets) Regulations 2018, SI 2018/188 transposes Directive 2016/943/EC into Irish law and inserts s 5(7A) into the 2014 Act, which provides that ‘Where a worker, referred to in *subsection (1)*, makes a disclosure of relevant information in the manner specified by that subsection, and in respect of that disclosure of relevant information it is alleged that the disclosure concerned the unlawful acquisition, use, or disclosure of a trade secret (within the meaning of the European Union (Protection of Trade Secrets) Regulations 2018 (S.I. No. 188 of 2018)), disclosure is a protected disclosure provided that the worker has acted for the purposes of protecting the general public interest.’ Protected Disclosures Act 2014, s 5(7A).

⁷²⁵ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 33.

⁷²⁶ *ibid* 42.

(vii) Limit the risk of reputation and financial damage.⁷²⁷

In ‘Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations’, a guide resulting from four years of research into the management of whistleblowing in the Australian public sector, four reasons were identified as to why it is essential that public sector managers manage whistleblowing properly in the workplace. These reasons are as follows:

- it is increasingly accepted that employee reporting is often the most effective and fastest way for senior management of organisations to become aware of problems in their organisation
- if organisations do not manage whistleblowing effectively, it is now well known that complaints are more likely to be taken outside the organisation, including into the public domain, leading to greater conflict, embarrassment and cost
- organisations that support employees in fulfilling their duty to report concerns are more likely to become known as good workplaces and employers of choice, while organisations who do not are more likely to become liable for failing to provide employees with a safe, healthy and professional working environment
- public sector agencies are increasingly subject to specific statutory obligations to manage whistleblowing to a high standard, as part of their jurisdiction’s public integrity systems.⁷²⁸

The benefits outlined above apply to prescribed persons’ internal disclosures. Prescribed persons should also establish Procedures with information for workers in order to assist them in making their disclosure to the organisation in its capacity as a prescribed person. Many of the benefits outlined would also apply to prescribed persons’ Procedures. Bowers et al identified nine benefits of implementing adequate Procedures to address concerns of workers. There is an overlap of some of those benefits for both internal and prescribed persons’ Procedures, and these can be summarised as follows:

- (i) It creates a more healthy and accountable workplace where issues are addressed quickly.
- (ii) It may act as an early warning system.

⁷²⁷ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para D(2).

⁷²⁸ Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 9.

(iii) It ensures that critical information comes to the attention of persons who can affect action.

(iv) It may deter workers from participating in malpractice in the knowledge that a colleague may raise concerns of same under the Procedures.

(vi) It reduces the risk of litigation if concerns are addressed and handled appropriately.⁷²⁹

Thus, implementing Procedures assists an organisation in managing whistleblowing properly in the workplace by establishing formal processes that are known and understood by both management and workers alike. Further, prescribed persons' Procedures will encourage and promote the making of disclosures to the prescribed person, and it will assist recipients in their response to the disclosure.

4.5(a)(i) *The impact of the existence/non-existence of Procedures in legal proceedings*

The importance of establishing robust Procedures cannot be understated. The UK Committee on Standards in Public Life⁷³⁰ stated in its Tenth Report in relation to PIDA that:

4.35 Firstly, it is important to reiterate that the Act is a statutory 'backstop' to ensure that employees who follow prescribed procedures for raising concerns are not victimised or suffer detriment as a result. Where an individual case reaches the point of invoking the Act then this represents a failure of the internal systems in some respect. Either the employee has failed to follow the procedure (for whatever reason) or the procedures themselves have failed. In our view, therefore, any case where the Act is invoked should initiate a review of the whistleblowing procedures in that organisation.⁷³¹

This statement underpins the necessity for prescribed persons to implement effective Procedures. If an organisation has established Procedures and a worker fails to comply with their employer's Procedures, this will be taken into consideration during protected disclosure proceedings. As can be seen from the case law analysis in the 'Reference to protected disclosures procedures' section of Chapter 3, the legal principles that can be drawn from the Irish case law under the 2014 Act are that firstly, a complainant's case is less likely to

⁷²⁹ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 19.02.

⁷³⁰ The Committee on Standards in Public Life advises the Prime Minister on ethical standards across the whole of public life in the UK. It monitors and reports on issues relating to the standards of conduct of all public office holders. For more information, see: <www.gov.uk/government/organisations/the-committee-on-standards-in-public-life> accessed 29 June 2016.

⁷³¹ Committee on Standards in Public Life, *Getting the Balance Right: Implementing Standards of Conduct in Public Life, Tenth Report* (Committee on Standards in Public Life 2005) 89.

succeed if they do not utilise their employer's Procedures;⁷³² and secondly, if the complainant's employer does not have Procedures or if they are outdated or defective, this does not mean that the claim automatically succeeds.⁷³³ On the face of it, these decisions seem to lean in favour of the employer. It appears that a worker does not benefit from the employer's omission to implement Procedures or to update its Procedures. This position adopted by the Workplace Relations Commission ('WRC') could act as a disincentive for an employer to establish Procedures, as there is no real sanction for failing to implement such Procedures. This is a deficit in respect of the obligations on public bodies under s 21 of the 2014 Act. Nonetheless, taking into consideration the statement by the Adjudication Officer in *A Senior Official v A Local Authority*⁷³⁴ where he stated that 'It is obvious that the respondent should update its policy and procedure regarding protected disclosures; this does not, however, mean that such a complaint should automatically succeed', tends to indicate that not having Procedures, or having outdated or defective Procedures, would be one of a number of factors that an adjudication officer would take into consideration in their deliberations. Nevertheless, the benefit for the employer in having Procedures is that the disclosure would be less likely to be considered a protected disclosure if the worker does not make their disclosure in line with those Procedures.⁷³⁵ There does not seem to be any consequential benefit to the worker in either scenario.

4.5(a)(ii) *The DPER Guidance*

All public bodies are obliged to establish and maintain Procedures under s 21(1) of the 2014 Act. Section 21(3) of the 2014 Act provides that 'The Minister may issue guidance for the purpose of assisting public bodies in the performance of their functions under *subsection (1)* and may from time to time revise or re-issue it.' Section 21(4) goes on to provide that 'Public bodies shall have regard to any guidance issued under subsection (3) in the performance of their functions under subsection (1).'⁷³⁶ A draft DPER Guidance was issued by the Minister for Public Expenditure and Reform in September 2015. Following this, a

⁷³² *Employee v Employer* ADJ-00003371; *A Worker v A Nursing Home* ADJ-00000267.

⁷³³ *A Senior Official v A Local Authority* ADJ-00001721; *A Commercialisation Specialist v A Government Agency* ADJ-00007228; *Training Co-ordinator v A Social Support Service* ADJ-00002320.

⁷³⁴ *A Senior Official v A Local Authority* ADJ-00001721.

⁷³⁵ Note that Protected Disclosures Act, s10, provides that if a disclosure is made to a recipient other than the worker's employer or responsible person, prescribed person, Minister, or legal advisor, in proceedings under the 2014 Act, the reasonableness of the worker's disclosure must be considered. One of the factors that regard must be had to in determining the reasonableness of the disclosure, is where a disclosure of substantially the same information was made to the worker's employer or responsible person, whether the worker complied with any procedure the use of which by the worker was authorised by the employer. *ibid* s 10(3)(e).

⁷³⁶ *ibid* s 21(4).

public consultation was undertaken on the draft DPER Guidance in April 2015. On 10 March 2016, the government published the DPER Guidance to assist public bodies with their obligation under s 21(1) of the 2014 Act to establish and maintain Procedures in the workplace by providing advice and information on how they should design and operate their Procedures.⁷³⁷ The DPER Guidance is one of a suite of measures designed to support the implementation of the 2014 Act.

The DPER Guidance is based primarily on international best practice for whistleblowing arrangements and sets out how Procedures are to be introduced, operated, and reviewed. It is devised on the premise that a one-size-fits-all approach is not appropriate given the different nature and scope of public sector bodies. Therefore, the content of the Procedures of an individual public body will be a matter for that particular body to consider having regard to its own unique and individual circumstances. It is the government's intention, however, that a degree of consistency in relation to the content of Procedures is achieved. The DPER Guidance thus provides the fundamentals of a good set of Procedures. The DPER Guidance has been hailed as being effective in demonstrating how statutory guidance is a valuable method of explaining how the law is intended to operate as well as encouraging best practice, which goes beyond the minimum statutory floor of rights.⁷³⁸

The key principles informing the DPER Guidance are:

- 1.1 All disclosures of wrongdoing in the workplace should, as a matter of routine, be the subject of an appropriate assessment and / or investigation and the identity of the discloser should be adequately protected; and
- 1.2 Providing that the worker discloses information relating to wrongdoing, in an appropriate manner, and based on a reasonable belief, no question of penalisation should arise.
2. If those two principles are respected, there should be no need for disclosers to access the protections and redress contained in the 2014 Act.⁷³⁹

⁷³⁷ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).

⁷³⁸ Lauren Kierans and David Lewis, 'Using statutory guidance and codes of practice to build on whistleblowing legislation: the Irish experience' (2016) 10 *La Revue des droits de l'homme* <<https://journals.openedition.org/revdh/2716>> accessed 24 November 2018.

⁷³⁹ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016) para C.

The requirement to have regard to this DPER Guidance applies only to public bodies. In their presentation to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, TII argued that Head 26 of the Draft Heads of the Protected Disclosure in the Public Interest Bill 2012 which required public bodies to establish and publish internal Procedures be extended to all organisations in the public, private, and non-profit sector.⁷⁴⁰ This recommendation was not adopted, but instead, the WRC drafted a Statutory Code of Practice on Procedures,⁷⁴¹ which applies to both private and non-profit organisations.⁷⁴² The draft EU Commission Directive on whistleblowing proposes that Member States must ensure that certain public and private sector legal entities establish internal channels and procedures both for reporting and for following up on reports.⁷⁴³ The explanatory memorandum explains that ‘This obligation is meant to ensure that information on actual or potential breaches of Union law reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible.’⁷⁴⁴ It would be expected that this obligation is also meant to ensure that those who report such breaches are protected from any retaliation. It remains to be seen to what extent this obligation will apply to the private sector and if the 2014 Act will go even further and apply it to the non-profit sector. If these obligations are adopted, then DPER Guidance for these sectors should be developed. With respect to prescribed persons, as public bodies, they are obliged to establish and maintain Procedures under s 21(1) of the 2014 Act and to have regard to the DPER Guidance under s 21(4) of the 2014 Act when developing their Procedures. The focus of this research in this section is to determine whether prescribed persons are complying with their statutory obligations under ss 21(1) and 21(4) of the 2014 Act.

4.5(b) Are prescribed persons complying with their obligations under s 21(1) of the 2014 Act to establish and maintain protected disclosures procedures?

⁷⁴⁰ Joint Committee on Finance, Public Expenditure and Reform Deb 13 June 2012.

⁷⁴¹ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464.

⁷⁴² It is important to note that Industrial Relations Act 1990, s 42(4), provides that a Code of Practice is admissible in evidence in proceedings and any provision of the code which appears to be relevant to any question arising in the proceedings will be taken into account in determining that question.

⁷⁴³ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 4(1).

⁷⁴⁴ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 11.

As a result of the prescribed persons' website search on 15 and 16 January 2018, twenty-six Procedures were located.⁷⁴⁵ The follow-up search on 17 and 18 February 2018 located three further Procedures.⁷⁴⁶ Thus, of the 102 prescribed persons, only twenty-seven had Procedures available on their website.⁷⁴⁷ A further two organisations had prescribed persons' Procedures available on their websites even though they have not been statutorily prescribed as recipients of protected disclosures under section 7 of the 2014 Act.⁷⁴⁸

Of those organisations who did have Procedures, seventeen were local authorities⁷⁴⁹, and twelve were organisations other than local authorities⁷⁵⁰. In identifying the number of prescribed persons with Procedures, this was broken down further into whether prescribed persons had Procedures for internal disclosures only, for disclosures received in their capacity as a prescribed person only, or Procedures for disclosures that were received both internally and in their capacity as a prescribed person. The results were as follows:

- (i) Of the seventeen local authorities, twelve had a single Procedures document for both internal disclosures and disclosures received in their capacity as a prescribed person.⁷⁵¹ Five local authorities had Procedures that concerned internal disclosures only, which were interim Procedures.⁷⁵²
- (ii) Of the twelve organisations other than local authorities, five had Procedures that were solely for disclosures in their role as a prescribed person;⁷⁵³ four had a single

⁷⁴⁵ Commission for Regulation Utilities (CRU); Comptroller and Auditor General (C&AG); Coras Iompar Éireann (CIÉ); CORU, Health Insurance Authority (HIA); Higher Education Authority (HEA); Carlow CC; Cavan CC; Clare CC; Fingal CC; Galway CC; Galway City Council; Kildare CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; South Dublin CC; Wexford City Council and CC; Westmeath CC; Wicklow CC; Marine Institute; Office of the Revenue Commissioners (Revenue); Pharmaceutical Society of Ireland (PSI); State Examinations Commission (SEC).

⁷⁴⁶ Irish Auditing and Accounting Supervisory Authority (IAASA); Kerry CC; Sea Fisheries Protection Authority (SFPA).

⁷⁴⁷ C&AG; CIÉ; HIA; HEA; IAASA; Carlow CC; Cavan CC; Clare CC; Fingal CC; Galway CC; Galway City Council; Kerry CC; Kildare CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; South Dublin CC; Wexford City Council and CC; Westmeath CC; Wicklow CC; Marine Institute; Revenue; PSI; SFPA; SEC.

⁷⁴⁸ The Opticians Board is prescribed under SI 2014/339 to receive protected disclosures under s 7 of the 2014 Act. However, its registration transferred automatically to the Optical Registration Board at CORU. The Commission for Energy Regulation ('CER') is also prescribed under SI 2014/339 to receive protected disclosures under s 7 of the 2014 Act, however, it changed its name to CRU in 2017.

⁷⁴⁹ Carlow CC; Cavan CC; Clare CC; Fingal CC; Galway CC; Galway City Council; Kerry CC; Kildare CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; South Dublin CC; Wexford City Council and CC; Westmeath CC; Wicklow CC.

⁷⁵⁰ C&AG; CIÉ; HIA; HEA; IAASA; Marine Institute; Revenue; PSI; SFPA; SEC.

⁷⁵¹ Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; Wicklow CC.

⁷⁵² Clare CC; Galway CC; Kildare CC; South Dublin CC; Wexford City Council and CC.

⁷⁵³ IAASA; PSI; SFPA; CORU; CRU.

Procedures document for both internal disclosures and disclosures received in their capacity as a prescribed person;⁷⁵⁴ two had Procedures for internal disclosures only;⁷⁵⁵ and one had two separate Procedures, one internal and one prescribed persons.⁷⁵⁶

Thus, of the twenty-seven prescribed persons who had Procedures publicly available, twenty had Procedures available for workers who wished to make a disclosure to the organisation in its capacity as a prescribed person. This is only 20% of the persons prescribed. The other two organisations, CORU and CRU, also had prescribed persons' Procedures available but as they are not statutorily prescribed as a person to receive protected disclosures, then a worker using their Procedures to make a disclosure would not be protected under s 7 of the 2014 Act. These findings can be contrasted with the prescribed persons' survey responses to question 4, which asked 'Does your organisation have specific procedures for receiving protected disclosures as a prescribed person (separate to any you may have for internal staff)?' Sixteen (84%) prescribed persons confirmed that they did, whilst three (16%) stated that they did not.⁷⁵⁷ Although the response rate to the survey is quite low, there is a clear conflict between the numbers of prescribed persons who stated that they did have separate Procedures for receiving disclosures as a prescribed person and the number of such Procedures that were located during the research conducted of the prescribed persons' websites. Of the prescribed persons who confirmed in the survey that they did have specific procedures for receiving protected disclosures as a prescribed person (separate to any they have for internal staff), only one of those Procedures could be located during the research conducted for this chapter. Therefore, as there is a higher rate of prescribed persons indicating that they have prescribed persons' Procedures than what was located during the research, there is an issue as regards their accessibility and availability, thus requiring action to be taken in this regard.

⁷⁵⁴ C&AG; HIA; Marine Institute; Revenue.

⁷⁵⁵ CIÉ; SEC.

⁷⁵⁶ HEA.

⁷⁵⁷ In the Phillips and Lewis prescribed persons' study carried out in the UK in 2013, of the twenty-eight organisations who completed the full questionnaire, nineteen (68%) specified that they had a separate policy/procedures for external disclosures, whilst nine (22%) indicated that they did not, Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 15 Middlesex University Erepository. In the 2011 UK study on internal whistleblowing/confidential reporting procedures, of the twenty-six responses, twenty-two organisations indicated that they had such a procedure, David Lewis, 'A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998' (2007) Communications Law 125, 126.

Besides the twenty-seven prescribed persons whose Procedures were located on their websites, nine additional prescribed persons had information on their websites about the making of a protected disclosure to the organisation in its capacity as a prescribed person.⁷⁵⁸ Taking this into consideration, in addition to the twenty prescribed persons who had Procedures for disclosures to the organisation in its capacity as a prescribed person, this means that only 29% (twenty-nine) of persons prescribed had information publicly available in relation to disclosures to it as a prescribed person. This finding can be contrasted with the responses to question 16 in the survey, which asked ‘Is there information on your organisation’s website which tells external persons how to make a protected disclosure to your organisation?’ Eleven (58%) prescribed persons confirmed that there was information on their website, whilst five (26%) stated that it did not, and three (16%) said that they did not know. Ten prescribed persons answered the follow-on question to this, question 17, which asked ‘If yes, please indicate the type of information, i.e. procedures, webpage, online form etc.’ Three (30%) prescribed persons indicated that there was a webpage, one of which stated that there was a ‘webpage and guidance note’ and another stated that it had a ‘Webpage with indication of how to submit a disclosure’. The remaining seven (70%) prescribed persons indicated that the type of information was in the form of either policies and/or Procedures.

4.5(c) Analysis of whether prescribed persons are complying with their statutory obligations under s 21(4) of the 2014 Act

For the purposes of the analysis of whether prescribed persons are complying with their statutory obligations under s 21(4) of the 2014 Act, which obliges public bodies to have regard to the DPER Guidance issued by the Minister when establishing and maintaining Procedures, all twenty-nine Procedures that were located during the search for prescribed persons’ Procedures were assessed.

Of the 110 issues identified in the DPER Guidance to be included in the Procedures, the following compliance results were found:⁷⁵⁹

⁷⁵⁸ Central Bank; Environmental Protection Agency; Garda Síochána Ombudsman Commission; Health Products Regulatory Authority; Pensions Authority; Quality and Qualifications Ireland; Standards in Public Office Commission; Teaching Council; Veterinary Council of Ireland.

⁷⁵⁹ See: Appendix 3(b): ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’ and Appendices 3(c), (d), and (e), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons’.

Table 4.2 Compliance rate of prescribed persons with their obligations under s 21(4) of the 2014 Act

No	Name	Percentage	Prescribed Persons' Procedures Only	Internal Procedures Only	Internal & Prescribed Persons' Procedures
1	CORU (formally the Opticians Registration Board)	12	✓		
2	Comptroller and Auditor General (C&AG)	12			✓
3	Commission for Regulation of Utilities (CRU) (originally CER)	10	✓		
4	Coras Iompar Éireann (CIÉ)	14		✓	
5	Health Insurance Authority (HIA)	39			✓
6	Higher Education Authority (HEA) (Internal (x1) & PP (x1))	Internal (84) PP(20)	✓	✓	
7	Irish Auditing and Accounting Supervisory Authority (IAASA)	7	✓		
8	Carlow CC	73			✓
9	Cavan CC	73			✓
10	Clare CC	33		✓	
11	Fingal CC	73			✓
12	Galway CC	33		✓	
13	Galway City Co	73			✓
14	Kerry CC	73			✓
15	Kildare CC	33		✓	

16	Kilkenny CC	73			✓
17	Limerick City Co & CC	73			✓
18	Longford CC	73			✓
19	Monaghan CC	73			✓
20	Sligo CC	73			✓
21	South Dublin CC	33		✓	
22	Wexford City Co & CC	33		✓	
23	Westmeath CC	73			✓
24	Wicklow CC	73			✓
25	Marine Institute	92			✓
26	Office of the Revenue Commissioners (Revenue)	24			✓
27	Pharmaceutical Society of Ireland (PSI)	15	✓		
28	Sea Fisheries Protection Authority (SFPA)	35	✓		
29	State Examinations Commission (SEC)	83		✓	

Thus, as can be seen from the above table, the percentage of issues identified in the DPER Guidance that are included in the prescribed persons' Procedures, the overall average score obtained by organisations that had Procedures is 46%. When the Procedures are categorised into: (i) internal and prescribed persons' Procedures; (ii) prescribed persons' Procedures only; and (iii) internal Procedures only; the most comprehensive Procedures, on average, were Procedures that provided for both internal disclosures and prescribed persons' disclosures, which included 65% of the issues identified in the DPER Guidance to be included in Procedures. Internal Procedures only had on average 43%, whilst prescribed persons' Procedures only, contained 17% of the DPER Guidance issues. A clear concern is not only the fact that 20% (twenty) of prescribed persons have Procedures publicly available, but that of the prescribed persons' Procedures (including the two organisations purporting to be prescribed persons) there is a meager rate of compliance with the legal requirement under s 21(4) of the 2014 Act to have regard to the DPER Guidance issued under s 21(3) of the 2014 Act.

4.5(c)(i) Breakdown of the compliance rate of prescribed persons' Procedures with the issues in the DPER Guidance

Further analysis of the compliance rate of the prescribed persons' Procedures with the DPER Guidance checklist was undertaken in respect of the eighteen separate issues. This analysis was designed to identify patterns of inclusion or exclusion of particular issues in prescribed persons' Procedures. By identifying these patterns, it was hoped that weaknesses in the DPER Guidance could be detected and that specific issues that are causing confusion or concern for prescribed persons could be explored. The following issues were assessed:

- A. Policy statement
- B. Application
- C. What is a protected disclosure? This section included the issues of 'Relevant wrongdoings', 'Disclosure of information', 'Reasonable belief', and 'In connection with their employment'
- D. Making a protected disclosure
- E. Protection against penalisation (including dismissal and detriment)
- F. Confidentiality/ protection of identity
- G. Anonymous disclosures
- H. Personal complaint vs protected disclosures

- I. Motivation
- J. Assessment and Investigation
- K. Protection of the rights of Respondents
- L. Disciplinary record of discloser and other related matters
- M. Feedback
- N. Support and Advice
- O. Review
- P. Non-restriction of rights to make protected disclosures
- Q. Mandatory reporting
- R. The information that should be provided in a disclosure.

The results of the breakdown of the compliance rate with the eighteen issues in the DPER Guidance that are meant to be included in the Procedures are as follows:⁷⁶⁰

⁷⁶⁰ The results of the assessment of the eighteen issues listed in relation to the prescribed persons' Procedures are set out in detail in Appendices 3(c), (d), and (e), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons'.

Table 4.3 Breakdown of the compliance rate of prescribed persons' Procedures with the issues in the DPER Guidance

Issue	Prescribed Persons' Procedures Only	Internal Procedures Only	Internal & Prescribed Persons' Procedures	Total⁷⁶¹
A. Policy statement	6%	46%	40%	34%
B. Application	0%	29%	29%	23%
C. What is a protected disclosure?	32%	58%	65%	57%
D. Making a protected disclosure	31%	56%	82%	65%
E. Protection against penalisation (including dismissal and detriment)	3%	35%	70%	47%
F. Confidentiality/ protection of identity	28%	53%	83%	64%
G. Anonymous disclosures	13%	41%	45%	38%
H. Personal complaint vs	0%	50%	86%	59%

⁷⁶¹ The 'Total' percentage outlined is the percentage of the total number of sub-issues contained in each issue in the DPER Guidance, multiplied by the total number of Procedures available for analysis, ie thirty Procedures.

protected disclosures				
I. Motivation	8%	59%	64%	52%
J. Assessment and Investigation	6%	39%	70%	49%
K. Protection of the rights of Respondents	11%	33%	33%	29%
L. Disciplinary record of discloser and other related matters	0%	25%	13%	13%
M. Feedback	8%	14%	57%	36%
N. Support and Advice	0%	25%	6%	10%
O. Review	0%	25%	81%	50%
P. Non-restriction of rights to make protected disclosures	0%	13%	6%	7%
Q. Mandatory reporting	0%	21%	4%	8%
R. The information that should be provided in a disclosure	25%	3%	86%	61%

The results of the assessment of the individual issues in the DPER Guidance that should be included in Procedures, when taking all three types of Procedures together, illustrate that the issue that has been complied with the most is ‘D. Making a protected disclosure’. The issue that has been complied with the least when taking all Procedures together is ‘P. Non-restriction of rights to make protected disclosures’.

Looking at the three types of Procedures separately, the ‘Prescribed Persons’ Procedures only’ omitted seven issues entirely.⁷⁶² Of the issues that were included, the issue that was complied with the most was ‘C. What is a protected disclosure?’ Whilst, the issue that was complied with the least was ‘E. Protection against penalisation (including dismissal and detriment)’.

Procedures that concerned internal disclosures only, complied with the issue of ‘I. Motivation’ the most, whilst the issue that was complied with the least was ‘R. The information that should be provided in a disclosure’.

Procedures that concerned both internal disclosures and disclosures in their capacity as a prescribed person, complied with the issue of ‘H. Personal complaint vs protected disclosures’ the most, whilst it complied with the issue of ‘Q. Mandatory reporting’ the least.

Therefore, in addition to the overall compliance rate of ‘Prescribed Persons’ Procedures Only’ being the lowest of all the types of Procedures, when looking at each issue separately, the ‘Prescribed Persons’ Procedures Only’ have the lowest rate of compliance consistently, with the exception of one issue ‘R. The information that should be provided in a disclosure’.⁷⁶³ These low compliance rates emphasise the necessity for prescribed persons to have specific guidance formulated to assist them in their role under s 7 of the 2014 Act and in complying with their statutory obligations under s 21 of the 2014 Act.

On assessment of each issue in the DPER Guidance,⁷⁶⁴ specific difficulties were identified in the context of the overall analysis of the Procedures. Two notable difficulties were evident

⁷⁶² ‘B. Application’; ‘H. Personal complaint vs protected disclosures’; ‘L. Disciplinary record of discloser and other related matters’; ‘N. Support and Advice’; ‘O. Review’; ‘P. Non-restriction of rights to make protected disclosures’; ‘Q. Mandatory reporting’.

⁷⁶³ In comparison to the local authorities who had finalised their Procedures, the local authorities who had interim internal Procedures did not have an appendix with a form/sample form for reporting a protected disclosure.

⁷⁶⁴ The compliance rate in respect of the constituent parts of each particular issue can be seen in Appendices 3(c), (d), and (e), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons’.

in relation to ‘Application’ and ‘What is a protected disclosure?’⁷⁶⁵ These two issues are discussed below.

4.5(c)(ii) *Application*

Unsurprisingly, the DPER Guidance addresses issues that reflect the provisions of the 2014 Act. It provides that Procedures should set out to whom they will apply and recommends that their coverage should reflect the definition of ‘worker’ in s 3 of the 2014 Act.⁷⁶⁶ The 2014 Act contains quite a broad definition of ‘worker’ and includes, employees, contractors, consultants, agency staff, former employees, temporary employees, interns, trainees, and members of the Defence Forces.⁷⁶⁷ At Report Stage of the Protected Disclosures Bill 2013 (‘2013 Bill’), an amendment was made to extend the definition of ‘employee’ to cover members of the Garda Síochána, and civil servants⁷⁶⁸ who do not work under formal contracts of employment.⁷⁶⁹

Despite the comprehensive definition of ‘worker’ under the 2014 Act, volunteers were left out of the definition due to the lack of a contractual relationship between persons providing voluntary services and employers, the non-remuneration status of volunteers, and because an employment tribunal was deemed not to be an appropriate forum under which a volunteer could seek redress. Former Minister for Public Expenditure and Reform, Brendan Howlin (‘Howlin’) stated that:

I do not see a compelling case for their inclusion in these provisions. Moreover, it would be very difficult for a volunteer to find a mechanism that would fit him or her within the architecture of this protection system. Seeking a restitution of position, pay or anything like this from the Labour Court would not apply.⁷⁷⁰

It is arguable that, although a volunteer who has made a disclosure does not face reprisal in terms of remuneration or promotion prospects, as would arise for a worker, the volunteer

⁷⁶⁵ The following three issues are dealt with in Chapter 5: ‘F. Confidentiality/ protection of identity’; ‘G. Anonymous disclosures’; and ‘K. Protection of the rights of Respondents’. The reason why these three issues are not addressed in this chapter is because it was deemed that the findings in relation to those issues were more suitable to an assessment in light of the analysis undertaken in Chapter 5 in relation to the balancing of rights of the discloser and the rights of the alleged wrongdoer.

⁷⁶⁶ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(3.1).

⁷⁶⁷ Protected Disclosures Act 2014, s 3(1).

⁷⁶⁸ Within the meaning of the Civil Service Regulation Act 1956.

⁷⁶⁹ Dáil Deb 12 June 2014, vol 843.

⁷⁷⁰ Select Sub-Committee on Public Expenditure and Reform Deb 14 May 2014, 4.

may suffer other forms of retribution because of having made a disclosure of wrongdoing. Many volunteers in charitable organisations are volunteering their time, skill, and energy because they have a personal vested interest in the work being carried out by that organisation or because they want to change things for the better⁷⁷¹ or to help people.⁷⁷² The work being carried out by the volunteer would, therefore, be an important part of the person's life and an important commitment that he or she has made to the organisation. If a volunteer uncovers wrongdoing in the course of carrying out his or her voluntary efforts and makes a disclosure in this respect, the volunteer may be subjected to, for example, coercion, intimidation, harassment, injury, damage, or loss. If this does occur, then the volunteer should have access to the whistleblowing mechanisms under the legislation and associated protections contained therein.⁷⁷³ This sentiment is reflected in the explanatory memorandum to the draft EU Commission Directive on whistleblowing, which states:

Effective whistleblower protection implies protecting also further categories of persons who, whilst not relying on their work-related activities economically, may nevertheless suffer retaliation for exposing breaches. Retaliation against volunteers and unpaid trainees may take the form of no longer making use of their services, or of giving a negative reference for future employment or otherwise damaging their reputation.⁷⁷⁴

At EU level, Member States are being urged to take the requisite steps to institutionalise volunteering in a manner consistent with their national labour laws.⁷⁷⁵ Further, at EU level, with respect to whistleblowing law, in particular, Member States are consistently being pressed to include coverage of volunteers in their national framework. For example, the Council of Europe Recommendation (2014)7 on the Protection of Whistleblowers states that

⁷⁷¹ Volunteer Ireland, 'National Survey of Volunteers 2013' (Volunteer Ireland 2013) 24. The report examines whether formal volunteering had positive effects on teenagers and young adults (aged 16-35) who registered to volunteer during 2012. An online survey was emailed to a sample group of registered volunteers in this age group. In response to the question 'Why did you become a volunteer?' Thirty per cent of the two hundred volunteers surveyed said it was because they wanted to make a difference/ change things for the better. This was the primary reason why persons chose to become a volunteer.

⁷⁷² *ibid.* In response to the question 'Why did you become a volunteer?' Twenty-two per cent of volunteers surveyed said it was because they wanted to help people. This was the joint-second most popular reason given by the volunteers surveyed as to why they became a volunteer.

⁷⁷³ Lauren Kierans, 'Whistle While You Work: Protected Disclosures Act 2014' (2015) 2(2) Irish Business Law Review 31, 39.

⁷⁷⁴ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) para 28. See also: Explanatory Memorandum to the Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers' Deputies (SPDP Council of Europe 2014) para 79; Transparency International, 'A Best Practice Guide for Whistleblowing Legislation' (TI 1 March 2018) 11.

⁷⁷⁵ European Parliament, Resolution 2013/2064(INI) Volunteering and voluntary activity in Europe, para 27.

‘The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.’⁷⁷⁶ Also, the draft EU Commission Directive on whistleblowing provides that the Directive applies to volunteers.⁷⁷⁷

International best practice principles recommend that volunteers should be included in whistleblower legislation. The Organisation for Economic Co-operation and Development (‘OECD’) recommends that legislation should contain a clear definition of the persons afforded protection under the law and states that examples of best practice in support of this principle could include inter alia the affording of protection to volunteers.⁷⁷⁸ It further provides that a ‘no loophole’ approach to the scope of coverage of protected persons would ensure that coverage also includes volunteers.⁷⁷⁹ Transparency International advocates that a broad definition of whistleblower should include volunteers.⁷⁸⁰ Blueprint for Free Speech also recommends that a broad definition of whistleblower should cover volunteers.⁷⁸¹ The US Government Accountability Project (‘GAP’)⁷⁸² proposes that whistleblower policies should cover all applicants or personnel who carry out activities relevant to the organisation’s mission and that this should include volunteers.⁷⁸³ GAP identifies that what is important in determining who should be protected when making disclosures is the

⁷⁷⁶ Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers’ Deputies (SPDP Council of Europe 2014) app, principle 3.

⁷⁷⁷ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 2(1)(c).

⁷⁷⁸ Organisation for Economic Co-operation and Development, ‘G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers’ (OECD 2011) 30-31.

⁷⁷⁹ *ibid* 9.

⁷⁸⁰ Transparency International, ‘International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest’ (TI 2013) 4-5. These international principles are intended to serve as guidance for formulating new and improving existing whistleblower legislation. They take into account lessons learned from existing laws and their implementation in practice, and have been shaped by input from whistleblower experts, government officials, academia, research institutes and NGOs from all regions. It is recommended that the principles are adapted to an individual country’s political, social and cultural contexts, and to its existing legal frameworks.

⁷⁸¹ Blueprint for Free Speech, ‘Whistleblower Protection Rules in G20 Countries: The Next Action Plan’ (Blueprint for Free Speech 2014) 4.

⁷⁸² The Government Accountability Project is the leading whistleblower protection and advocacy organisation in the United States. It is a non-partisan public-interest group that litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. Since its founding in 1977, GAP has helped over 6,000 whistleblowers. For more information, see: <www.whistleblower.org> accessed 14 December 2018.

⁷⁸³ Government Accountability Project, International Best Practices for Whistleblower Policies (GAP 2013) 4.

contribution that the applicant or personnel can make by bearing witness, not their formal status.⁷⁸⁴

There is evidence of volunteers being included in a number of whistleblowing law statutes globally. For example, the New Zealand Protected Disclosures Act 2000 ('2000 Act') provides that an employee of an organisation may disclose information in accordance with the 2000 Act and defines an employee, in relation to an organisation, as including 'a person who works for the organisation as a volunteer without reward or expectation of reward for that work.'⁷⁸⁵ Also, the Kosovan draft Law on Protection of Whistleblowers provides for protection of volunteers. Article 3(1.1) defines a whistleblower as 'any person who reports or discloses information on threat or damage to the public interest in the context of own employment relationship in the public or private sector.' It stipulates that a person in the context of an employment relationship is a natural person who is or has been in an employment relationship with a public institution or private entity, regardless of the nature of the relationship, its duration or payment and this includes a volunteer⁷⁸⁶ or a candidate for volunteering activities.⁷⁸⁷ In addition, the Serbian Law on the Protection of Whistleblowers Act, no 128/2014 provides that "'Whistleblower" shall mean any natural person who performs whistleblowing in connection with his employment; hiring procedure'⁷⁸⁸ and goes on to define 'employment' as including volunteering.⁷⁸⁹

Therefore, in order to be in line with international best practice principles for whistleblower protection legislation, volunteers should have been included in the 2014 Act. The inclusion of volunteers was an opportunity for innovation in the 2014 Act, but unfortunately, this opportunity was missed, thus leaving nearly 15,000 registered volunteers in Ireland⁷⁹⁰ without comprehensive protection when raising concerns of wrongdoing.⁷⁹¹ As argued by

⁷⁸⁴ *ibid.*

⁷⁸⁵ Protected Disclosures Act 2000, s 3(g).

⁷⁸⁶ Draft Law on Protection of Whistleblowers, art 3(1.5.2).

⁷⁸⁷ *ibid* art 3(1.5.3).

⁷⁸⁸ Law on the Protection of Whistleblowers Act, no 2014/128, art 2(2).

⁷⁸⁹ *ibid* art 2(5).

⁷⁹⁰ In 2016, there were 14,830 volunteers registered with I-Vol (Volunteer Ireland database) and local Volunteer Centres. Volunteer Ireland, 'Volunteering Statistics' (*Volunteer Ireland*) <www.volunteer.ie/resources/volunteering-statistics/> accessed 12 November 2018.

⁷⁹¹ Lauren Kierans, 'Whistle While You Work: Protected Disclosures Act 2014' (2015) 2(2) *Irish Business Law Review* 31, 57-58. 'Persons' are protected under the Charities Act 2009, s 61, to the extent that they have protection from civil liability in respect of certain disclosures, but this protection is far from comprehensive when compared to the protections available under the 2014 Act.

Lewis, as a matter of principle, granting employment protection rights to as wide a range of people as possible is desirable.⁷⁹²

Despite their exclusion from the statute, it was intended that specific provision for volunteers would be included in the DPER Guidance.⁷⁹³ This commitment has been preserved, and the DPER Guidance suggests that Procedures can go further than the definition of ‘worker’ in the 2014 Act and apply to volunteers. The DPER Guidance provides that:

While the 2014 Act applies to workers and does not include volunteers within that definition, volunteers may disclose wrongdoing and the public body should consider how any such disclosures will be dealt with, any protections that may be appropriate for volunteers in such circumstances and how they will be made aware of any risks that may arise for them in making a disclosure. Public bodies should confirm in their Procedures that any disclosures from volunteers will be appropriately assessed and / or investigated.⁷⁹⁴

It has been recognised that it is entirely appropriate to use guidance and codes of practice to invite employers to consider extending the scope of their whistleblowing arrangements beyond the statutory minimum.⁷⁹⁵ However, this approach does not bring volunteers within the remit of the legislation. Howlin intended that by including provision for volunteers in the DPER Guidance this would ensure that the 2014 Act provides a framework for public bodies within which appropriate arrangements can be made to receive reports made by volunteers that do not fall within the ambit of the legislation.

The DPER Guidance provides that six issues regarding the issue of ‘Application’ should be included in Procedures.⁷⁹⁶ With respect to these issues, the compliance rate of the Procedures was identified as follows:

(i) Of the organisations that had prescribed persons’ Procedures only,⁷⁹⁷ none addressed the issue of ‘Application’ at all.⁷⁹⁸

⁷⁹² David Balaban Lewis, ‘Nineteen years of whistleblowing legislation in the UK: is it time for a more comprehensive approach?’ (2017) 59(6) *International Journal of Law and Management* 1126, 1129.

⁷⁹³ *Dáil Deb* 12 June 2014, vol 843.

⁷⁹⁴ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(3.2).

⁷⁹⁵ Lauren Kierans and David Lewis, ‘Using statutory guidance and codes of practice to build on whistleblowing legislation: the Irish experience’ (2016) 10 *La Revue des droits de l’homme* <<https://journals.openedition.org/revdh/2716>> accessed 24 November 2018.

⁷⁹⁶ See: Appendix 3(b): ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’.

⁷⁹⁷ CORU; CRU; HEA; IAASA; PSI; and SFPA.

⁷⁹⁸ See: Appendix 3(c), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons.’

(ii) Of those Procedures that were internal only,⁷⁹⁹ the HEA addressed three issues,⁸⁰⁰ the five local authorities addressed two issues,⁸⁰¹ the SEC contained one issue,⁸⁰² whilst CIÉ did not address the issue of ‘Application’ at all.

(iii) Of those organisations that had both internal and prescribed persons’ Procedures,⁸⁰³ the local authorities included two issues,⁸⁰⁴ whilst the C&AG, the HIA, the Marine Institute, and Revenue included one issue only.⁸⁰⁵

Thus, as can be seen from the results in relation to the six issues identified in the DPER Guidance regarding ‘Application’, there was evidence of only 23% compliance when taking all the Procedures together. Those organisations that had internal Procedures only and organisations that had both internal and prescribed persons’ Procedures attained 29% compliance. Of concern is the fact that those organisations with only prescribed persons’ Procedures had 0% compliance.

Despite the intentions of Howlin for volunteers to be included in the DPER Guidance, it is clear that this approach to providing protection for volunteers is not succeeding. From the analysis of the Procedures, only one prescribed person (the HEA internal Procedures) included an attempt at considering how disclosures from volunteers would be dealt with. The HEA internal Procedures provide that:

These Procedures apply to all workers as defined in section 3 of the 2014 Act, which includes current and former employees, independent contractors, trainees and agency staff in the HEA and the IRC. While the Act only applies to workers; volunteers and members of the public may disclose wrongdoing and any such disclosures will be appropriately assessed and investigated.⁸⁰⁶

This provision merely states that the disclosures from volunteers will be ‘appropriately assessed and investigated’, but it does not address the protection considered appropriate for volunteers who make disclosures or how volunteers will be made aware of any risks that

⁷⁹⁹ CIÉ; SEC; HEA; Clare CC; Galway CC; Kildare CC; South Dublin CC; and Wexford City Council and CC.

⁸⁰⁰ See: Appendix 3(d), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,’ B1, B2, and B3.

⁸⁰¹ *ibid* B1 and B2.

⁸⁰² *ibid* B1.

⁸⁰³ C&AG; HIA; Marine Institute; Revenue; Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; and Wicklow CC.

⁸⁰⁴ See: Appendix 3(e), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,’ B1 and B2.

⁸⁰⁵ *ibid* B1.

⁸⁰⁶ Higher Education Authority, ‘Protected Disclosures Procedures’ (Higher Education Authority) 4.1.

may arise for them in making a disclosure. The intention underpinning the DPER Guidance regarding volunteers was that disclosures from volunteers would receive at most internal organisational protections, but this intention has not been achieved if the HEA internal Procedures are the only Procedures that address this issue and yet it is done in a particularly weak manner. What is interesting to note about the internal Procedures of the HEA is that they are also intended to apply to members of the public. Members of the public do not fall within the ambit of the 2014 Act. In practice, it remains to be seen what protections the HEA could give to members of the public who make disclosures, although, as the Procedures are silent in respect of the issue of protection of such persons, this may indicate an intention not to extend any protection to such persons.

The issue of volunteers was highlighted by the HEA in response to question 4 of the DPER Statutory Review, which asked ‘Are there any of the definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? For example, is the definition of "worker" too broad or too narrow or does it strike the right balance?’⁸⁰⁷ The HEA submitted that ‘Many organisations e.g. charities have raised the issue of volunteers who, although not workers or employees, carry out the same work as employees. The Act may need to be amended to reflect this.’⁸⁰⁸

For prescribed persons who have volunteers under their remit, their inclusion in the DPER Guidance and not in the 2014 Act may lead to confusion for both the volunteer in relation to what protections they can receive and for the prescribed person in relation to what protections it can afford. The submission by the HEA in relation to question 4 of the DPER Statutory Review in respect of volunteers highlights this confusion. In response to the submissions on volunteers, the DPER Statutory Review stated:

The Act contains a very broad definition of ‘worker’ including employees, workers under contract, those who are provided with work experience pursuant to training courses etc. Much consideration was given to the inclusion of volunteers when the Bill was being drafted, but the advice was that it was not possible in view of the fact that they do not have an employment relationship, and their inclusion would open up to the provisions of the Act to the general public, which would dilute its purpose and focus. As such, employment law remedies cannot be applied. The situation is similar with students on placement.

⁸⁰⁷ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 51.

⁸⁰⁸ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

The prevailing view among experts internationally is that whistleblower legislation should not extend beyond the basis of a workplace relationship, because of the access to information available to workers which is not available outside the workplace, and as the risk of sanctions against workers because of their employment status requires that specific legal protections be made available. The guidance issued by the Minister sets out, however, that every effort should be made to apply protections to volunteers etc. in so far as possible.⁸⁰⁹

The position adopted in the DPER Statutory Review is clearly in conflict with the international best practice principles outlined above which recommend that volunteers fall within the ambit of whistleblowing protection legislation.

A glaring concern arising from the results in relation to the issue of ‘Application’ is that only the seventeen local authorities and the HEA cover all workers as defined in s 3 of the 2014 Act.⁸¹⁰ Therefore, only 60% of the Procedures assessed apply to workers as defined under the 2014 Act. If, however, the local authorities are taken out of this analysis this percentage drops significantly to only 8%. Further, the fact that prescribed persons have entirely omitted the issue of ‘Application’ from their Procedures for disclosures received solely in their capacity as a prescribed person indicates a possible apprehension on the part of prescribed persons in specifying from whom they can receive disclosures in their role as a prescribed person. These deficits could be explained by a miscomprehension of the coverage of the 2014 Act. For example, in response to question 4 of the DPER Statutory Review,⁸¹¹ the HEA submitted that ‘There should perhaps be clarity provided in respect of former or retired employees of an organisation and whether they can make a protected disclosure.’⁸¹² Despite this confusion, for a person who is familiar with the provisions of the 2014 Act, it is arguably quite clear that former employees can make protected disclosures as the 2014 Act provides that an employee has the meaning given by s 1 of the Unfair Dismissals Act 1977⁸¹³ (‘1977 Act’) which defines ‘employee’ as:

[A]n individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment and, in relation to redress for a

⁸⁰⁹ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 35.

⁸¹⁰ See: Appendix 3(b): ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’

⁸¹¹ Question 4 asked ‘Are there any of the definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 51.

⁸¹² Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁸¹³ Protected Disclosures Act 2014, s 3(1).

dismissal under this Act, includes, in the case of the death of the employee concerned at any time following the dismissal, his personal representative.⁸¹⁴

Further miscomprehension can be demonstrated by the submission made by GSOC, a prescribed person, to the DPER Statutory Review, which stated:

The Garda Síochána Protected Disclosure Policy (February 2017) confirms that reports of wrongdoing by members of the Garda Reserve will be treated as protected disclosures.

It appears that there is a concern that the definition of “worker” as set out in section 3 of the Protected Disclosures Act, 2014 does not cover reserve members of the Garda Síochána.

Proposed solution

A statutory amendment to specifically include reserve members of the Garda Síochána as “workers” under the Protected Disclosures Act, 2014.⁸¹⁵

In response to this submission, the DPER Statutory review stated ‘The advice of the Office of the Attorney General is that Reserve Members of the Gardaí are covered by the protections of the Act to the same extent as other members.’⁸¹⁶ This response conflicts with the decision of *Commissioner of An Garda Síochána v Oberoi*,⁸¹⁷ where Feeney J concluded that a volunteer in the Garda Reserve was not employed under a contract of employment.

These submissions from prescribed persons and the low compliance rate with the issues that should be included in Procedures in relation to ‘Application’ as outlined in the DPER Guidance demonstrate the necessity for the provision of training in order to improve the comprehension of the 2014 Act. Further, the fact that none of the Procedures concerning disclosures to organisations in their capacity as a prescribed person addressed the issue of ‘Application’ at all underscores the necessity for the publication of guidance specifically for prescribed persons, which details the type of workers that disclosures can be received from and the inclusion of appropriate examples.

⁸¹⁴ Unfair Dismissals Act 1977, s 1.

⁸¹⁵ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁸¹⁶ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 35.

⁸¹⁷ *Commissioner of An Garda Síochána v Oberoi* [2013] IEHC 267, [2014] ELR 17. Further, Garda Síochána Act 2005, s 15(6) (as inserted by Criminal Justice Act 2007, s 43), provides that ‘A reserve member is a volunteer and does not perform his or her functions as such a member under a contract of employment.’

Further, the failure to extend protections in the 2014 Act to volunteers is a missed opportunity. The provision for workers and third parties to seek redress for detriment in tort law⁸¹⁸ would have been a sufficient mechanism for a volunteer to seek redress for detriment suffered as a result of having made a protected disclosure. It is illogical that a family member who suffers a detriment because of another family member who is a worker made a protected disclosure can have access to redress, but a person who makes a disclosure in the workplace is excluded because they are deemed to be a volunteer. The inclusion of specific provisions for volunteers in the DPER Guidance is not appropriate because: (i) it provides, at most, internal organisational protections, which are far from copper fastened; (ii) it is limited to volunteers in the public sector; and (iii) it may lead to confusion as to the types of protection that can be afforded to such persons.

4.5(c)(iii) *What is a protected disclosure?*

The second notable issue causing difficulty in the context of the overall analysis of the Procedures is the issue of ‘C. What is a protected disclosure?’ The DPER Guidance sets out what a protected disclosure is, as defined under the 2014 Act, and provides that the procedures should explain the meaning of terms included in this definition, eg ‘information’; ‘relevant wrongdoing’; ‘reasonable belief’; ‘in connection with their employment’; etc.⁸¹⁹ In total, the DPER Guidance provides that eleven issues regarding the issue of ‘What is a Protected Disclosure?’ should be included in Procedures.⁸²⁰ With respect to these issues, the compliance rate of the Procedures was identified as follows:

(i) Of the organisations that had prescribed persons’ Procedures,⁸²¹ the HEA addressed ten issues,⁸²² the SFPA addressed six issues,⁸²³ CORU addressed three,⁸²⁴ the PSI addressed two issues,⁸²⁵ whilst the CRU and the IAASA failed to address any of the issues.

⁸¹⁸ Protected Disclosures Act 2014, s 13.

⁸¹⁹ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(4-8).

⁸²⁰ See: Appendix 3(b): ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’.

⁸²¹ CORU, CRU, HEA, IAASA, PSI, and SFPA.

⁸²² See: Appendix 3(c), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,’ C1, C2, C3, C5, C6, C7, C8, C9, C10, and C11.

⁸²³ *ibid* C1, C2, C5, C6, C8, and C10.

⁸²⁴ *ibid* C1, C2, and C10.

⁸²⁵ *ibid* C2 and C5.

(ii) Of those Procedures that were internal only,⁸²⁶ the SEC addressed ten issues,⁸²⁷ whilst the HEA addressed nine issues,⁸²⁸ the local authorities addressed six issues,⁸²⁹ and CIÉ addressed two issues.⁸³⁰

(iii) Of those organisations that had both internal and prescribed persons' Procedures,⁸³¹ the Marine Institute addressed nine issues,⁸³² the local authorities addressed eight issues,⁸³³ the HIA addressed six issues,⁸³⁴ Revenue addressed three issues,⁸³⁵ whilst the C&AG addressed only one issue.⁸³⁶

Thus, taking all the Procedures together there was a compliance rate of 57%. Those organisations with both internal and prescribed persons' Procedures obtained 65% compliance, whilst organisations that had internal Procedures only, achieved 58% compliance. Organisations with prescribed persons' Procedures only, obtained a compliance rate of 32%, which is the highest compliance rate by these Procedures of the eighteen issues in the DPER Guidance.

However, with respect to all three types of Procedures, an issue that appears to be causing particular difficulty for prescribed persons is the issue in 'C4' which requires public bodies to refer to other relevant employment specific/profession specific obligations that do not fall under the definition of 'relevant wrongdoing' in the 2014 Act. This issue was only included in the Procedures of one prescribed person, Revenue, which has a single Procedures document for both internal disclosures and disclosures in its capacity as a prescribed person.

International best practice recommends that there should be a broad coverage of information that can attract protection, ie 'protectable information'. Transparency International emphasises that whistleblowing legislation should have both a broad and clear definition of

⁸²⁶ CIÉ; SEC; HEA; Clare CC; Galway CC; Kildare CC; South Dublin CC; and Wexford City Council and CC.

⁸²⁷ See: Appendix 3(d), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' C1, C2, C3, C5, C6, C7, C8, C9, C10, and C11.

⁸²⁸ *ibid* C1, C2, C3, C5, C6, C7, C8, C9, and C10.

⁸²⁹ *ibid* C1, C2, C5, C7, C9, and C10.

⁸³⁰ *ibid* C2 and C5.

⁸³¹ C&AG; HIA; Marine Institute; Revenue; Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; and Wicklow CC.

⁸³² See: Appendix 3(e), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' C1, C2, C3, C5, C6, C7, C8, C9, and C10.

⁸³³ *ibid* C1, C2, C5, C7, C8, C9, C10, and C11.

⁸³⁴ *ibid* C1, C2, C5, C7, C8, and C10.

⁸³⁵ *ibid* C 2, C4, and C5.

⁸³⁶ *ibid* C10.

whistleblowing that ensures that as wide a range of wrongdoing as possible is covered.⁸³⁷ It stresses that limiting the scope of protectable information hinders whistleblowing.⁸³⁸ The Council of Europe recommends that Member States should take a broad approach to the scope of protectable information and highlights that by ‘Restricting legal protection to those who disclose only certain types of information, such as corruption offences for example, and only to certain bodies will risk confusing “whistleblowing in the public interest” with “informing” or “denouncing” and may increase opposition to the law and distrust in its purpose.’⁸³⁹ Further, in its Recommendation (2014)7 on the Protection of Whistleblowers, the Council of Europe emphasises that a comprehensive and coherent approach in national law and legislation to the protection of whistleblowers includes providing a coverage of persons and situations that are as wide as possible and that this approach ‘implies that the relevant norms may be legislative or contained in legal documents (such as collective bargaining agreements) and professional and employer codes.’⁸⁴⁰

The Norwegian legislation, the Working Environment Act 2005, contains an extensive definition of protectable information and provides that all employees in public and private sectors have the right to ‘notify censurable conditions at the employer’s undertaking. Workers hired from temporary-work agencies also have a right to notify censurable conditions at the hirer’s undertaking.’⁸⁴¹ The notification does not have to amount to a breach of the law but includes ‘any censurable activity’ (otherwise translated as ‘conditions worthy of criticism’).⁸⁴² Canada’s Public Servants Disclosure Protection Act 2005 (‘2005 Act’) defines a wrongdoing as including a serious breach of the Treasury Board’s or the organisation’s code of conduct established under the 2005 Act.⁸⁴³ The French whistleblowing law, Sapin II, includes both a list of categories of wrongdoing and a public interest category.⁸⁴⁴ This has the potential to extend protection to information outside of the

⁸³⁷ Transparency International, ‘A Best Practice Guide for Whistleblowing Legislation’ (TI 1 March 2018) 7.

⁸³⁸ *ibid.*

⁸³⁹ Council of Europe, ‘Protection of Whistleblowers: A Brief Guide for Implementing a National Framework’ (Council of Europe August 2016) 8.

⁸⁴⁰ Explanatory Memorandum to the Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers’ Deputies (SPDP Council of Europe 2014) para 50.

⁸⁴¹ Working Environment Act 2005 (as amended in 2017), s 2A-1(1).

⁸⁴² Council of Europe, ‘Protection of Whistleblowers: A Brief Guide for Implementing a National Framework’ (Council of Europe August 2016) 9.

⁸⁴³ Public Servants Disclosure Protection Act 2005, s 8(e).

⁸⁴⁴ LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), art 6.

specific categories listed.⁸⁴⁵ The approach adopted in Sapin II reflects the recommendation made by Protect's Whistleblowing Commission to amend PIDA to the extent that it contains a non-exhaustive list of wrongdoing, which would include helpful examples of what constitutes wrongdoing.⁸⁴⁶ This mixed approach to coverage of wrongdoing is also considered best practice by Transparency International.⁸⁴⁷

Thus, international best practice principles demonstrate that as wide a range of wrongdoings as possible are covered in national whistleblowing legislation, thus suggesting that breaches of employment specific/profession specific obligations could be included in whistleblowing legislation. Further, international best practice principles demonstrate that in defining the nature of the wrongdoings there should be a mixed approach adopted that includes a list of specific categories of wrongdoing but that this list is non-exhaustive.

At Report Stage of the 2013 Bill, Deputy Mary Lou McDonald ('Deputy McDonald') proposed an amendment that the following be inserted into the 2013 Bill "(c) that a person has failed, is failing or is likely to fail to comply with a nonstatutory obligation, such as that arising from a professional code or workplace code of practice or recognised international standard, where such obligation is intended to uphold human rights, or other rights of citizens,".⁸⁴⁸ Deputy McDonald explained that the objective of her amendment was to ensure that breaches of soft law or professional codes of conduct that do not have statutory footing are covered by the legislation. Howlin rejected this amendment on the basis of advice from the Office of the Attorney General that the inclusion of such codes would be inconsistent with the purposes of the 2013 Bill. He admitted that he understood the basis of the proposed amendment but argued that 'the legal analysis that I am bound to accept is that, where professional bodies or representative organisations apply particular codes or standards to their members that do not have the force of law, it is not possible to apply sanctions under legislation on a person who is alleged to have been penalised for reporting a breach in such codes or standards.' He also argued that the 'imposition of high levels of compensation', ie

⁸⁴⁵ Transparency International, 'A Best Practice Guide for Whistleblowing Legislation' (TI 1 March 2018) 9.

⁸⁴⁶ Protect, 'The Whistleblowing Commission, The report of the Whistleblowing Commission on the effectiveness of existing arrangements for workplace whistleblowing in the UK' (Protect November 2013) para 77.

⁸⁴⁷ Transparency International, 'A Best Practice Guide for Whistleblowing Legislation' (TI 1 March 2018) 9; Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (TI 2013) 4.

⁸⁴⁸ Dáil Deb 12 June 2014, vol 843.

the five years' gross remuneration compensation, could not be sustained in respect of a breach of 'soft law'.

Howlin explained that in order to recognise the intention of the proposed amendment within the overall framework of whistleblower protection that he was examining how the Procedures established and maintained by public bodies could address this issue. Howlin stated that the aim of his approach to the legislation was in respect of the overall framework of protecting whistleblowers and in that regard, it appears that the Procedures are intended to address any lacuna where issues that are deemed to be relevant to whistleblower protection but cannot have statutory force, are dealt with. Unfortunately, as with the issue of volunteers, there appears to be a difficulty for prescribed persons with respecting the obligations under the DPER Guidance that do not fall within the ambit of the 2014 Act in the Procedures.

As mentioned, Revenue was the only prescribed person that included the issue of breaches of employment specific/profession specific obligations in its Procedures and provided that 'A worker should make a disclosure if in their reasonable belief any of the wrongdoings outlined in section 5 has occurred, is occurring or is likely to occur or there has been a breach of Revenue or Civil Service policy such that harm may be arising to others or to the Organisation.'⁸⁴⁹ The Procedures provide protection from reprisal to workers who disclose wrongdoing covered by the policy.⁸⁵⁰ However, as with the issue of volunteers, it should be made clear that protection from reprisal for having made a disclosure relating to the Revenue or Civil Service policy can only be internal organisational protection and that the worker cannot avail of the protections under the 2014 Act for such disclosures. Revenue failed to do this in its Procedures.

The attempt to ensure that disclosures from workers in relation to employment specific/profession specific obligations are encouraged and accepted by public bodies and that such workers are protected, by including this issue in the DPER Guidance, is not achieving its aim. The notable omission of this issue by prescribed persons in their Procedures underscores the contention that either: (i) more detailed information regarding this issue be included in updated DPER Guidance; or (ii) the 2014 Act be amended to include such disclosures in the list of relevant wrongdoings. The suggestion to amend the 2014 Act echoes the statement by Deputy McDonald at Report Stage of the 2013 Bill where she stated

⁸⁴⁹ Office of the Revenue Commissioners, 'Revenue Policy on Protected Disclosure Reporting in the Workplace' (Office of the Revenue Commissioners August 2014) 4.

⁸⁵⁰ *ibid* 3.

that ‘If the Minister is not minded to amend the legislation in the way I am suggesting we have at least noted it on the record of the Oireachtas and if at any stage it becomes apparent that this is a difficulty, we have the option of amending the legislation. I withdraw the amendment.’ Despite the clear difficulty in relation to this issue, as identified in this research, no amendment was adopted following the recent DPER Statutory Review.

The DPER Statutory Review responded to submissions from TII and the Department of Employment Affairs and Social Protection on this issue⁸⁵¹ and stated that:

It is a matter of policy that breaches of codes and guidelines are not specifically listed as wrongdoings, in that the legislation is intended to protect workers’ rights. Private law bodies determine their own codes and rules which apply to members and it is up to those bodies to revise their codes if necessary to align with the Act. If there are breaches of such codes they are likely to be covered under the categories of wrongdoings; if not, they are unlikely to be serious matters that would cause a detriment to the public interest. They would also be likely to be subject to a disciplinary process.⁸⁵²

As pointed out in the DPER Statutory Review, there is a possibility for overlap where a breach of a code may also constitute a breach of a legal obligation under the 2014 Act. This possibility would also extend to a circumstance where there is no breach of a legal obligation but where a worker reasonably believes that a breach of employment specific/profession specific obligations is a breach of a legal obligation.⁸⁵³ However, this would not include a situation where the worker merely believes that the breach is wrong.⁸⁵⁴ If a regulatory obligation is imposed on foot of a statutory power, there may be scope for arguing that a disclosure of a breach of a regulatory obligation could constitute a breach of a legal

⁸⁵¹ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁸⁵² Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 32.

⁸⁵³ See: UK decision of *Babula v Waltham Forest College* [2007] ICR 1026 (CA) [75] where the Court of Appeal stated that ‘Provided his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute.’ However, even if the worker does not identify the relevant wrongdoing, the adjudication body must identify the legal obligation that has been breached, as can be seen from the UK decision of *Eiger Securities LLP v Korshunova* [2017] ICR 561 (EAT) [46] where the UKEAT held that in order to fall within s 43 B(1)(b) of the Employment Rights Act 1996, the Employment Tribunal should have identified the source of the legal obligation to which the claimant believed her colleagues were subject and how they had failed to comply with it.

⁸⁵⁴ See: *Eiger Securities LLP v Korshunova* [2017] ICR 561 (EAT) [46] where the UKEAT stated that ‘The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.’

obligation.⁸⁵⁵ This is particularly so where there is a lack of a clear distinction between a legal and a regulatory obligation. This would reinforce the reasonableness of a subjective belief that a regulatory obligation entails a legal obligation.⁸⁵⁶ However, these issues are ones that would arise in a penalisation or detriment claim before the WRC or courts. It is necessary to provide clarity for disclosers and recipients of disclosures in advance of this stage as to the scope and nature of the obligations and protections associated with disclosures relating to employment specific/profession specific wrongdoings and the suggestions regarding the provision of more detail on these in an updated DPER Guidance or an amendment to the 2014 Act should be considered.

4.6 Conclusion

The intention underpinning the prescribed persons' system under the 2014 Act is that it provides a mechanism for the wrongdoing disclosed by a worker to be addressed and for disclosers to be protected by providing alternative safe disclosure channels if required. The system operates when a worker chooses to make their disclosure to a prescribed person in circumstances where they are unable or unwilling to make their disclosure to their employer. In that regard, the worker expects that the prescribed person will be the solution to their concern by investigating it and holding the employer to account, thus vindicating the disclosure made by the worker. In order for a disclosures system to be effective, not only must disclosers be protected, but also recipients of disclosures must act on the information disclosed to them in order to remedy the wrongdoing. The explanatory memorandum to the draft EU Commission Directive on whistleblowing highlights that 'Lack of confidence in the usefulness of reporting is one of the main factors discouraging potential whistleblowers.'⁸⁵⁷

However, various studies in the UK have identified that there is an expectation gap in relation to the worker's expectations of prescribed persons' powers. This expectation gap is echoed in Ireland. For example, in its submission to the DPER Statutory Review by the prescribed person, the Pensions Authority, it stated that:

The Authority's experience has been that those making disclosures often believe that the Authority is compelled to investigate the matter by virtue of the fact that it has

⁸⁵⁵ Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 3.120.

⁸⁵⁶ *ibid.*

⁸⁵⁷ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 10.

been made pursuant to the PD Act, notwithstanding the fact that following a thorough assessment of the issues highlighted, no reasonable grounds to suspect wrongdoing exists ... the PD Act does not alter the remit or functions of any statutory body nor does it negate the body's legal obligations in respect of exercising fair procedures and due process when deciding whether to initiate an investigation. Explaining this to disclosers can be difficult and therefore clarity should be provided in the legislation in order to avoid any ambiguity and to manage expectations.⁸⁵⁸

Further, the submission made by the prescribed person, the Teaching Council, to the DPER Statutory Review also highlights the expectation gap, where it stated 'In the case of an external disclosure received by the Director of the Council as a Prescribed Person, the capacity to investigate may be limited or non-existent.'⁸⁵⁹ In addition, in response to the survey in this study, one prescribed person stated 'The big weakness in the Act are the lack of formal investigative processes. There are limited powers under our establishing legislation to investigate the type of complaint I am prescribed to receive. It is hard to envisage a type of protected disclosure that I could actually investigate as envisaged under the 2014 Act.'⁸⁶⁰

In order to remedy this expectation gap in the UK, a statutory obligation was introduced for prescribed persons to report annually on the disclosures received by them. As discussed, there is a similar obligation on prescribed persons in Ireland, in addition to a requirement to establish and maintain Procedures. The purpose of the annual reports is to improve the confidence of workers with the prescribed persons' system by making it more transparent. It is also intended to drive up standards across the prescribed persons' system. However, from the data obtained in this study, a number of concerns were identified with the obligations to publish annual reports and Procedures.

Firstly, only 21% (nineteen) of the ninety-two prescribed persons included in the assessment had complied fully with their obligation to prepare and publish their annual reports. Secondly, only 20% (twenty) of all persons prescribed had Procedures publicly available for disclosures in their capacity as a prescribed person, whilst 9% (nine) had information, other than Procedures, on their website. This means that only 29% (twenty-nine) prescribed persons had information publicly available for disclosers who wished to make a disclosure to a prescribed person. This data can be contrasted with the survey responses, where 84%

⁸⁵⁸ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁸⁵⁹ *ibid.*

⁸⁶⁰ See: Appendix 2(c), 'Default Report Protected Disclosures Prescribed Person Survey'.

(sixteen) of the prescribed persons who responded stated that they had specific Procedures for receiving disclosures as a prescribed persons and 58% (eleven) confirmed that there was information on their website which tells external persons how to make a disclosure to it. When contrasting the findings from the website search and the survey responses, there is a higher rate of prescribed persons indicating in the survey that they have prescribed persons' Procedures than what was located during the research. Also, from the survey responses, there is evidence that there are more prescribed persons indicating that they have Procedures than those indicating that they have information on their websites. This means that there is an issue as regards the accessibility and availability of information/Procedures.

Difficulties for prescribed persons in complying with the obligation to establish Procedures were emphasised by the Teaching Council in the DPER Statutory Review where it stated that 'The implementation of the Act both in terms of developing internal and external Protected Disclosure policies has been challenging and costly.'⁸⁶¹ The responses to the survey indicated that prescribed persons were not given additional funding to assist them with the additional costs that the role of a prescribed person may incur. In that regard, 83% (fifteen) prescribed persons stated that they had not been given additional funding, whilst 17% (three) did not know if they had been given additional funding.

If there is no information made publicly available to workers regarding disclosures to prescribed persons then the result of this is that the prescribed person is unlikely to receive disclosures. According to the data from the case law analysis undertaken in Chapter 3, a protected disclosure has never been made to a prescribed person in the first instance, and of those cases where a disclosure was subsequently made externally, it was made to a prescribed person in five cases. From this case law analysis, there are a number of hypotheses as to why there are a low number of cases concerning disclosures to a prescribed person. The first hypothesis is that disclosures are not being made to prescribed persons because: (i) the worker is unaware that disclosures can be made to prescribed persons; (ii) the worker suffered penalisation for having made a disclosure to their employer and as a result does not attempt to raise it again with a prescribed person; and/or (iii) the wrongdoing does not come within the remit of the prescribed person. The second hypothesis is that disclosures are being made to prescribed persons but prescribed persons are complying with their obligation of

⁸⁶¹ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

confidentiality, and therefore the worker does not suffer penalisation for having made their disclosure to the prescribed person and as a result does not need to take a claim for penalisation.

However, there was also evidence from the data from the annual reports and the survey results of a low rate of disclosures being made to prescribed persons. Thirty-five per cent (twenty-three) of prescribed persons who had published annual reports had received protected disclosures, whilst 37% (seven) of survey respondents indicated that they had received protected disclosures. Of those who had received protected disclosures, the majority of prescribed persons, (71% (five) of survey respondents and 65% (fifteen) of the annual reports) received disclosures in the lower bracket of disclosures, ie between '1-4' disclosures.

Nonetheless, the data from the annual reports are not entirely reliable as firstly, only sixty-six prescribed persons published annual reports. Secondly, only four prescribed persons had reported within the correct timeframe. Thirdly, only eleven prescribed persons had made the distinction clear as to whether the annual report concerned disclosures received in their capacity as a prescribed person, as an employer, or as a s 10 disclosure. Fourthly, from the survey results, ten prescribed persons did not know in what capacity their annual reports were published, ie as an employer, as a prescribed person, or as both. Of clear concern is that five of those prescribed persons indicated that their annual report was neither as an employer nor as a prescribed person. The aforementioned findings underscore the miscomprehension regarding the annual reporting obligations under the 2014 Act.

A difficulty with the reporting obligations, although not manifestly obvious from the assessment of the annual reports, is the obligations on prescribed persons to designate a disclosure as a protected disclosure. This difficulty is voiced, however, in the responses to the prescribed persons' survey. The prescribed persons were asked 'How does your organisation decide whether or not a disclosure is a protected disclosure for the purposes of the section 22 annual report?' Sixteen prescribed persons answered this question. Three indicated that this issue had not arisen, as they had not received any protected disclosures. Of the remaining responses, there was a range of approaches indicated.⁸⁶² The lack of

⁸⁶² These answers included the following: 'Reviewed by protected disclosure officer in line with policy'; 'Matter referred to prescribed person for consideration'; 'If the disclosure is treated as a protected disclosure under the Act, it is reported in the Annual report.'; 'It is extremely difficult to determine. The only way to know for sure is if the worker is penalised, claims protection and the claim is upheld. Therefore we report on

consistency in the approaches adopted by prescribed persons in their assessment of whether a disclosure constitutes a protected disclosure means that the usefulness of the annual reports is questionable. The manner in which s 22(2) of the 2014 Act is drafted is potentially the source of this difficulty. Section 22(2) of the 2014 Act prescribes that the report should contain information relating to the ‘number of protected disclosures made to the public body’. A disclosure can only be determined to be a protected disclosure if it is subject to adjudication before a court or WRC. There is no guidance for prescribed persons to assist them in their determination of a disclosure as a protected disclosure for the purposes of the annual report. In the UK, prescribed persons’ annual reports must contain ‘the number of workers’ disclosures received during the reporting period that the relevant prescribed person *reasonably believes* are- (i) qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996; and (ii) which fall within the matters in respect of which that person is so prescribed’.⁸⁶³ Further, the prescribed person is ‘not required to report on disclosures that it reasonably believes do not fall within the description of matters in respect of which that person is so prescribed.’⁸⁶⁴ The inclusion of a ‘reasonable belief’ requirement ensures that the prescribed persons in the UK are not expected to determine whether a disclosure is a public interest disclosure.⁸⁶⁵ The approach adopted in the UK would be of assistance to prescribed persons in Ireland, in addition to the publication of guidance as to what is meant by ‘reasonable belief’ that a disclosure is a protected disclosure.

As with the assessment of the case law data, the findings of the annual reports and survey in relation to the low number of disclosures being made to prescribed persons lead to a number of hypotheses. Firstly, there is no necessity for workers to make a disclosure to a prescribed

the numbers of disclosures ‘processed according to our protected disclosures procedure.’; ‘Disclosures that relate to ‘relevant wrongdoings’ as defined in the Protected Disclosure Act 2014 (section 5 subsections 3(a) to (h)’; ‘Don’t know’; ‘Investigate submission and consider’; ‘We assess whether the complaint falls within remit, is a valid complaint, and is made by a person to whom the Protected Disclosure Act applies’; ‘Prescribed person makes the judgement’; ‘Our only disclosure will be in the 2018 annual report’; ‘Legal advice’; and ‘by the individual circumstances’.

⁸⁶³ The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507, reg 5(a) (emphasis added).

⁸⁶⁴ *ibid* reg 3(3).

⁸⁶⁵ The UK BEIS Consultation on prescribed persons’ annual reporting requirement on whistleblowing proposed that the regulations would provide that the annual reports should cover information such as ‘The number of disclosures that qualify as protected public interest disclosures’, Department for Business, Energy and Industrial Strategy, ‘Small Business, Enterprise and Employment Bill, Prescribed persons: annual reporting requirements on whistleblowing’ (BEIS August 2014) 7. In response to strong views made by respondents to the consultation that it should not be for the regulator to determine that a disclosure is a public interest disclosure, the Government noted that this could place too much of a burden on prescribed persons, Department for Business, Energy and Industrial Strategy, ‘Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response’ (BEIS March 2015) 4.

person, as wrongdoing is not taking place. However, according to TII's IAW survey, of 878 employees surveyed, 17% indicated that they had had good reason to believe that wrongdoing was taking place where they worked, at any time in their working life. This equates to a population estimate of 257,000.⁸⁶⁶ Secondly, workers are making their disclosures internally to their employer who is remedying that wrongdoing and therefore there is no necessity to make the disclosure externally from the employer to the prescribed person in order for the wrongdoing to be rectified. Thirdly, workers are not aware that disclosures can be made to prescribed persons. This third hypothesis can be substantiated by the low rate of prescribed persons making their Procedures/information on their role publicly available. This necessitates the introduction of a statutory obligation on prescribed persons to make information publicly available. The statutory obligations on the Central Bank, discussed above, to publish information on reporting mechanisms in a separate, easily identifiable, and accessible section of its website⁸⁶⁷ could be replicated in the 2014 Act and imposed on prescribed persons. This recommendation for amendment to the 2014 Act is further substantiated in light of the proposal under art 10 of the draft EU Commission Directive on whistleblowing for Member States to ensure that competent authorities publish information regarding the receipt of reports and their follow-up in a separate, easily identifiable, and accessible section of their website.⁸⁶⁸ Further, it may be appropriate to impose a sanction on prescribed persons who do not comply with their obligations to publish Procedures. In its submission to the DPER Statutory Review, Fianna Fáil suggested that the Procedures established and maintained by public bodies are subject to an audit and review by DPER and that DPER should provide recommendations as to how the Procedures can be improved. Further, Fianna Fáil suggested that there should be some sort of penalty imposed on public bodies that have not set up clear procedures.⁸⁶⁹

However, in requiring prescribed persons to publish information/Procedures on their websites, there needs to be appropriate guidance as to what must be published. As identified in this research, the prescribed persons who had Procedures publicly available had included only 17% of the issues in the DPER Guidance that should be included in their Procedures.

⁸⁶⁶ Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 36.

⁸⁶⁷ European Union (Market Abuse) Regulations 2016, SI 2016/349, reg 16(a).

⁸⁶⁸ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 10.

⁸⁶⁹ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

Of the eighteen issues assessed, prescribed persons did not include seven of the issues at all in their Procedures for disclosures received in their capacity as a prescribed person only.⁸⁷⁰ Further, in respect of each issue, prescribed persons consistently had the lowest rates of compliance, excluding the issue of ‘R. The information that should be provided in a disclosure’. This low compliance rate is not only detrimental to the making of disclosures by workers to it as a prescribed person, but it also means that prescribed persons are not leading by example to the organisations over which they have authority.⁸⁷¹ The difficulty experienced by prescribed persons in developing Procedures was highlighted by the Teaching Council in the DPER Statutory Review, where it submitted that:

[T]he role and powers of the Director of the Teaching Council as a Prescribed Person have been difficult to define. This creates difficulty when trying to provide published guidance for persons who may be contemplating making a disclosure. The issues that arose were: a. Who or what cohorts of workers are meant to be comprehended for the Director’s role as a Prescribed Person? b. What powers of investigation does the Director have, apart from the procedures under Part 5 (Fitness to Teach) of the Teaching Council Act which apply only to registered teachers, if a disclosure is received?’⁸⁷²

It is recommended that prescribed persons be issued with their own specific guidance for dealing with disclosures as prescribed persons. This guidance would cover the scope, role, and powers of prescribed persons; what should be included in their prescribed persons’ Procedures; how the Procedures should be made publicly available; and how to comply with their annual reporting obligations, including advice in relation to reporting on disclosures in their capacity as an employer, a prescribed person, and s 10 disclosures. Also, prescribed persons’ guidance needs to be supplemented with specific prescribed persons’ training. According to the survey responses, 53% (ten) of the prescribed persons indicated that they had received training on protected disclosures. Nevertheless, of the five prescribed persons who made comments on what they would like to add about their role as a prescribed person, three stated that there should be training for prescribed persons, thus underscoring the concern of prescribed persons in relation to this issue.

⁸⁷⁰ B. Application; H. Personal complaint vs protected disclosure; L. Disciplinary record of discloser and other related matters; N. Support and advice; O. Review; P. Non-restriction of rights to make protected disclosures; Q. Mandatory reporting.

⁸⁷¹ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing, Prescribed Persons Guidance’ (BEIS March 2015) 7, provides that ‘prescribed persons can encourage organisations they oversee to have whistleblowing policies in place and assist in ensuring the arrangements are effective. One way to do this is to lead by example to ensure they have whistleblowing arrangements for their own staff that meet best practice.’

⁸⁷² Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

Further, the inclusion of non-statutory provisions in the DPER Guidance has caused difficulty for prescribed persons. Thus, as demonstrated by this research, the commitment by the government to include the issue of volunteers and employment specific/profession specific obligations that do not fall under the definition of ‘relevant wrongdoing’ in the 2014 Act in the DPER Guidance has created much confusion for prescribed persons. Only one prescribed person, the HEA included the issue of volunteers in its Procedures and only Revenue included the issue of employment specific/profession specific obligations. In both cases, neither prescribed person addressed the issue satisfactorily as they did not make it clear that such disclosures only attract internal organisational protections, which is understandable, as the nature of such protections is unclear. This issue of requiring prescribed persons to deal with non-statutory issues in their Procedures may be addressed by providing clarity in an updated DPER Guidance. However, it is recommended that these issues be given statutory footing in order to be in line with international best practice, to reduce the risk of confusion for both recipients of disclosures and disclosers, and to ensure that the purpose of the 2014 Act is fulfilled.

Despite the recommendations made above in relation to the obligations on prescribed persons regarding annual reporting and publishing Procedures, as well as the recommendations for providing specific guidance and training for prescribed persons, if the list of prescribed persons is not kept up to date, the prescribed persons’ system will not be effective. In order to attract the protections under the 2014 Act, a worker must make their disclosures to the correct prescribed persons under s 7. As identified in this research, ten prescribed persons have either been dissolved, had a change of name, have merged, or had their functions transferred to another organisation. In addition, the research identified a number of omissions from the list of prescribed persons. The omissions of certain appropriate organisations as prescribed persons has a number of ramifications. Firstly, a disclosure to a non-prescribed regulator is considered to be a s 10 disclosure under the 2014 Act, thus requiring the worker to satisfy a number of additional conditions in order to attract the protections under the 2014 Act. Secondly, the rate of disclosures to regulators who are not prescribed reduces if they are not provided with the formal status of a prescribed person, which attracts the protections under the 2014 Act.⁸⁷³ Thirdly, as recognised by Savage and Hyde, by prescribing some regulators and not others, this creates a hierarchy of both

⁸⁷³ Ashley Savage and Richard Hyde, ‘The response to whistleblowing by regulators: a practical perspective’ (2015) 35 *Legal Studies* 408, 427.

regulators and public interest concerns.⁸⁷⁴ As Savage and Hyde explain ‘Those regulators who are prescribed may be considered to be more important than those who are not. The concerns that prescribed regulators may receive may be deemed more important than those received by regulators who do not have prescribed status.’⁸⁷⁵

The necessity to identify the deficiencies in the list of prescribed persons is an issue that DPER appears to be conscious of and this can be seen in the DPER Statutory Review where it was confirmed that the prescribed persons’ SIs had been reviewed, and a commitment was made to update it, as appropriate.⁸⁷⁶ It referred specifically to the issue of s 38 and s 39 agencies in the health sector and stated that it is proposed to make the HSE a prescribed person, subject to the agreement of the Minister for Health and the HSE, to receive disclosures from such agencies in relation to functions in respect of which it is already a recipient under the Health Acts.⁸⁷⁷ Therefore, it is anticipated that the prescribed persons’ SI will be updated, both in respect of the list of prescribed persons and in respect of the matters which they are prescribed. It is also essential that in undertaking this review, that the powers of the prescribed persons are reviewed by the government in order to ensure that they are adequate to investigate and remedy the wrongdoing. It is recommended that in conjunction with updating the list that the practice adopted in the UK of requiring the UK BEIS to maintain a list of prescribed persons online and updating it promptly following any changes made by statutory instruments, as well as reviewing the list on an annual basis, should be replicated in Ireland.⁸⁷⁸ In that vein, it is recommended that instead of designating this function to an already overstretched governmental department, that an authority be established to oversee the prescribed persons’ system.

The functions of such an authority could include the following:

1. Ensuring that prescribed persons are establishing and maintaining Procedures.

⁸⁷⁴ *ibid* 416.

⁸⁷⁵ *ibid*.

⁸⁷⁶ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 44.

⁸⁷⁷ *ibid* 33.

⁸⁷⁸ This practice in the UK of maintaining an online database of prescribed persons arose in response to concerns raised in the whistleblowing framework call for evidence in the UK in 2014. Department for Business, Energy and Industrial Strategy, ‘Whistleblowing Framework Call for Evidence, Government Response’ (BEIS June 2014) 13.

2. Examining prescribed persons' Procedures to ascertain that they are clear and easy to understand.
3. Making sure that information on Procedures and information on the role of the prescribed person is made publicly available.
4. Monitoring prescribed persons' responses to disclosures received by them.
5. Establishing that prescribed persons have the correct powers to carry out their functions in relation to disclosures made to them pursuant to s 7 of the 2014 Act.
6. Ensuring that prescribed persons publish their protected disclosures' annual reports, as well as examining the content of the annual reports.
7. Certifying that the prescribed persons' SI is up-to-date in terms of the prescribed person itself and the description of matters in respect of which it is prescribed, as well as maintaining this list online.
8. Providing specific advice to prescribed persons, when requested, in respect of their role under the 2014 Act.
9. Publishing guidance to assist prescribed persons' in carrying out their functions in respect of protected disclosures.
10. Providing training to prescribed persons in relation to the receipt, investigation, and remediation of the wrongdoing.⁸⁷⁹
11. Receiving complaints in relation to the prescribed person in carrying out its role under the 2014 Act.
12. Reviewing any decision/finding/order made by prescribed persons in respect of an investigation of a relevant wrongdoing under the 2014 Act, ie a decision not to investigate; a finding that a relevant wrongdoing/no relevant wrongdoing had occurred; or any order made in respect of remedial action to be taken in relation to the relevant wrongdoing.

⁸⁷⁹ Phillips and Lewis suggest that joint training of prescribed persons could create a forum for prescribed persons to share their understanding of issues affecting them, as well as their practices and experiences. Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 13 Middlesex University Erepository.

13. Promoting the role of prescribed persons as a disclosure channel for workers under the 2014 Act.

14. Imposing penalties on prescribed persons who are not complying with their statutory obligations.

15. Ensuring that prescribed persons' have adequate resources, both financial and in terms of staff.

16. Reporting annually to DPER on the prescribed persons' system, including making recommendations for improvements to the system.

In addition to the establishment of this oversight authority, it is recommended that the UK Employment Tribunal ('ET') referral system be adopted in Ireland by the WRC. This referral system gives the ET the power to send copies of protected disclosures claims to regulators with the consent of the claimant.⁸⁸⁰ Concerns have been raised in the UK that the ET cannot always identify the correct prescribed person to refer the disclosure to and that by the time the case gets through the system the wrongdoing may have been resolved.⁸⁸¹ The requirement of the ET having to identify the correct prescribed person seems to be addressed by the introduction of a system whereby claims are forwarded to and processed at a central location, and the parties to the claim are notified which regulator the alleged wrongdoing has been referred to.⁸⁸² There is, of course, the risk that a wrongdoing may no longer exist at the time that the claim is filed. Nonetheless, at that stage, the referral system is essentially a 'backstop' for when the wrongdoing has still not been addressed, especially when the worker has made a claim against their employer, who may not be predisposed to remedying the wrongdoing alleged against them, or if the disclosure is buried in a settlement agreement.

The research undertaken for this chapter identified numerous weaknesses in the prescribed persons' system under the 2014 Act and recommendations have been made in order to

⁸⁸⁰ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 14. This referral system was introduced after a public consultation in 2009. The Government response to this consultation was published in 2010 and indicated that of the forty respondents, 61% supported the proposed approach to the referral system. Department for Business, Energy and Industrial Strategy, 'Government Response, Employment tribunal claims and the Public Interest Disclosure Act' (BEIS January 2010) 5.

⁸⁸¹ Department for Business, Energy and Industrial Strategy, 'Whistleblowing Framework Call for Evidence, Government Response' (BEIS June 2014) 6.

⁸⁸² Minh Alexander, 'Prescribed Persons or the Pretence of PIDA. How UK whistleblowers are ignored' (*Alexander's Excavations*, 14 October 2018) <<https://minhalexander.com/2018/10/14/prescribed-persons-or-the-pretence-of-pida-how-uk-whistleblowers-are-ignored/>> accessed 13 December 2018.

improve it, culminating in the recommendation for the establishment of an authority that oversees the prescribed persons' system. If the recommendations contained herein are adopted this will go some way to improving confidence in the system, not only by the discloser but also by the prescribed person in conducting its role under the 2014 Act, as well as ensuring that the purpose of the 2014 Act is respected.

However, even if the recommendations as outlined in this chapter are adopted, there may still be a risk that the purpose of the 2014 Act to protect workers who make protected disclosures will be undermined if on receipt of a disclosure an organisation fails to provide the proper protections to a worker. The research presented in the next chapter aims to assess the conflict for an organisation with regard to balancing the rights of the discloser and the alleged wrongdoer in the context of a protected disclosure and makes suggestions on how this conflict may be resolved in order to ensure that the purpose of the 2014 Act is achieved.

Chapter 5: Implementing protected disclosures procedures: practical issues for recipients of disclosures in relation to the discloser and the alleged wrongdoer

5.1 Introduction

When implementing protected disclosures procedures ('Procedures'), an area that raises significant difficulties for organisations is the balancing of the rights of the discloser against the rights of the alleged wrongdoer. On receipt of a disclosure, an organisation must task itself with balancing the rights of the discloser under s 16 of the 2014 Act to have their identity protected, subject to certain exceptions, and the rights of the alleged wrongdoer under natural justice and fair procedures and under data protection rules. The 'Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations' ('WWTW Guide')⁸⁸³ highlights that the receipt of disclosures couched in terms of a 'wrongdoer' as opposed to a 'wrongdoing' causes considerable difficulties for organisations, stating that:

Reports of wrongdoing that allege wrongdoing by another employee are not infrequent and create significant difficulties for organisations. Ideally, the ethical culture of an organisation would promote fair treatment and support for all parties involved in a report, and managers would be fully aware of how to protect the rights and interests of all parties.⁸⁸⁴

In order to explore this difficulty, the following issues are addressed in this chapter:

1. Confidentiality
2. Anonymous disclosures
3. Rights of the alleged wrongdoer
4. Data protection

5.1(a) Objectives

When implementing Procedures, organisations run the risk of breaching the rights of the discloser, which undermines the purpose of the 2014 Act, and/or the rights of the alleged wrongdoer, in attempting to apply fairness to the parties and to respect their rights equally.

⁸⁸³ The introduction to the WWTW Guide explains that the guide 'sets out the results from four years of research into how public sector organisations can better fulfil their missions, maintain their integrity and value their employees by adopting a current best practice approach to the management of whistleblowing.' Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 9.

⁸⁸⁴ *ibid* 68.

The objective of this research is to: (i) provide guidance to organisations as to what rules to apply when attempting to protect the rights of both parties; (ii) highlight where conflict may arise; and (iii) when a conflict arises, provide advice as to best practice to adopt when one party's rights take precedence over another party's rights.

5.1(b) Methodology

In Chapter 4, an analysis of the prescribed persons' Procedures was undertaken in light of the guidance published by the Department of Public Expenditure and Reform ('DPER') for the purpose of assisting public bodies in their establishment and maintenance of Procedures ('DPER Guidance').⁸⁸⁵ Of the nineteen issues contained in the checklist drafted of the issues outlined in the DPER Guidance that should be included in Procedures, three of the issues were omitted from the assessment in Chapter 4 as it was deemed that it was more appropriate that they would be addressed in this chapter to underpin the analysis of the balancing of rights of the discloser and the rights of the alleged wrongdoer. The issues in the DPER Guidance relating to 'Confidentiality/protection of identity', 'Anonymous disclosures', and 'Protection of the rights of Respondents'⁸⁸⁶ are assessed herein.

In addition to the analysis undertaken in relation to the issues contained in the DPER Guidance, much of the research for this chapter utilised a doctrinal methodology to evaluate the national and international statutory rules, precedent established in case law, articles, books, and international and national reports, covering the issues.

5.2 Confidentiality

5.2(a) Introduction

Confidentiality has been identified as the most effective way to encourage workers to come forward with information of wrongdoing.⁸⁸⁷ The prominence of protection of a discloser's identity in whistleblowing schemes is emphasised by the European Commission in its draft

⁸⁸⁵ Protected Disclosures Act 2014, s 21(3). Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).

⁸⁸⁶ The DPER Guidance refers to alleged wrongdoers as 'respondents', however, the use of this term for this purpose is erroneous as alleged wrongdoers are not respondents in the context of protected disclosures unless a claim is brought against them in legal proceedings on foot of the alleged wrongdoing or for a claim of personal liability under the 2014 Act.

⁸⁸⁷ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 1.

Directive on whistleblowing and provides in its explanatory memorandum that ‘Article 5 sets out the minimum standards that internal reporting channels and procedures for following up on reports should meet. In particular, it requires that reporting channels guarantee the confidentiality of the identity of the reporting person, which is a cornerstone of whistleblower protection.’⁸⁸⁸ The draft EU Commission Directive on whistleblowing places such weight on this issue that it provides that Member States must provide for penalties against both natural and legal persons if there is a breach of the duty of maintaining the confidentiality of the discloser.⁸⁸⁹ The imposition of criminal liability for revealing identifying information of the discloser already exists in some jurisdictions internationally. For example, under the Australian Public Interest Disclosure Act 2013, it is a criminal offence to disclose information obtained by a person in their capacity as a public official and that information is likely to enable the identification of the discloser as a person who has made a public interest disclosure,⁸⁹⁰ subject to certain exceptions.⁸⁹¹ The offence carries a penalty of imprisonment for six months and/or thirty penalty units.⁸⁹² Further, under the French whistleblowing law, Sapin II, a breach of confidentiality attracts two years’ imprisonment and a €30,000 fine.⁸⁹³

International best practice principles emphasise that whistleblowing legislation should ensure that organisations commit to protecting the identity of a discloser, as can be seen in the principles developed by Transparency International;⁸⁹⁴ Protect;⁸⁹⁵ the Council of

⁸⁸⁸ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 11.

⁸⁸⁹ *ibid* art 17(1)(d).

⁸⁹⁰ Public Interest Disclosure Act 2013, s 20(1).

⁸⁹¹ *ibid* s 20(3).

⁸⁹² *ibid* s 20(2).

⁸⁹³ LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), art 9(II).

⁸⁹⁴ Transparency International, ‘International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest’ (TI 2013) 5, provides that ‘the identity of the whistleblower may not be disclosed without the individual’s explicit consent.’

⁸⁹⁵ Protect, ‘The Whistleblowing Commission, The report of the Whistleblowing Commission on the effectiveness of existing arrangements for workplace whistleblowing in the UK’ (Protect November 2013) 29 which provides that ‘The best way to raise a concern is to do so openly. Openness makes it easier for the employer to assess the issue, work out how to investigate the matter and obtain more information.’

Europe,⁸⁹⁶ and the Organisation of Economic Co-Operation and Development (‘OECD’).⁸⁹⁷ These principles are reflected in whistleblowing legislation across numerous jurisdictions, including, Australia,⁸⁹⁸ Bolivia,⁸⁹⁹ Canada,⁹⁰⁰ Ecuador,⁹⁰¹ France,⁹⁰² Italy,⁹⁰³ Kosovo,⁹⁰⁴ New Zealand,⁹⁰⁵ Norway,⁹⁰⁶ Paraguay,⁹⁰⁷ Romania,⁹⁰⁸ Serbia,⁹⁰⁹ and the US.⁹¹⁰ In the UK, however, the Public Interest Disclosures Act 1998 (‘PIDA’) does not oblige organisations to protect the identity of the discloser. Nonetheless, guidance issued by the UK government highlights that maintaining confidentiality is considered to be best practice⁹¹¹ and this has been interpreted as being a promotion of the protection of confidentiality as the default position for an organisation when it receives a disclosure.⁹¹²

5.2(b) *The 2014 Act*

The inclusion of the issue of confidentiality in the 2014 Act reflects international best practice. Under the 2014 Act, the identity of the worker making the disclosure is protected to the extent that the person to whom the protected disclosure is made or the person to whom a protected disclosure is referred in the performance of that person’s duties, must not disclose

⁸⁹⁶ Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers’ Deputies (SPDP Council of Europe 2014) app, principle 18, which provides ‘Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.’ Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of “whistle-blowers”, which provides that ‘6.2. Whistle-blowing legislation should focus on providing a safe alternative to silence. 6.2.1. It should give appropriate incentives to government and corporate decision makers to put into place internal whistle-blowing procedures that will ensure that...6.2.1.2. the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest.’

⁸⁹⁷ Organisation for Economic Co-operation and Development, ‘G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers’ (OECD 2011) 31, provides that an example of best practice in ensuring that legislation provides robust and comprehensive protection to whistleblowers could include ‘Due process for both parties (the whistleblower and the respondent), including, inter alia, the need for protecting confidentiality’.

⁸⁹⁸ Public Interest Disclosures Act 2013, ss 20 and 21.

⁸⁹⁹ Law 458 for Whistleblower and Witness Protection 2013, art 2.

⁹⁰⁰ Public Servants Disclosure Protection Act 2005, ss 11(1)(a), 22(e) and 44.

⁹⁰¹ Criminal Code 1971, art 495.

⁹⁰² LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), art 9(I).

⁹⁰³ Legislative Decree 2015/72, s 18; Legislative Decree 1993/285, s 52-bis.

⁹⁰⁴ Draft Law on Protection of Whistleblowers, art 7.

⁹⁰⁵ Protected Disclosures Act 2000, s 19.

⁹⁰⁶ Working Environment Act 2005, s 2A-4.

⁹⁰⁷ Instructive Order 2014/7 from the Attorney General’s Office, art 5.

⁹⁰⁸ Law No 2004/571, art 3(b).

⁹⁰⁹ Law on the Protection of Whistleblowers Act, no 2014/128, arts 10 and 14.

⁹¹⁰ Whistleblower Protection Act 1989, 5 USC § 1213(h).

⁹¹¹ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing, Guidance for Employers and Code of Practice’ (BEIS March 2015) 10.

⁹¹² Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 19.57.

to another person, information that might identify the person who made the protected disclosure.⁹¹³ A failure by the disclosure recipient to comply with this section is actionable by the person who made the protected disclosure if that person suffers any loss by reason of the recipient's failure to comply.⁹¹⁴

This protection is not absolute, however, and disclosure of identity can occur in the following specific circumstances:

- (c) the person to whom the protected disclosure was made or referred reasonably believes that disclosing any such information is necessary for-
 - (i) the effective investigation of the relevant wrongdoing concerned,
 - (ii) the prevention of serious risk to the security of the State, public health, public safety or the environment, or
 - (iii) for the prevention of crime or prosecution of a criminal offence, or
- (d) the disclosure is otherwise necessary in the public interest, or is required by law.⁹¹⁵

Further, the disclosure recipient, and the person to whom the disclosure was referred to in the performance of that person's duties, can disclose to another person any information that might identify the person who made the protected disclosure if that person reasonably believes that the person who made the protected disclosure does not object to the disclosure of any information that might identify them.⁹¹⁶

The disclosure recipient and the person to whom the disclosure was referred in the performance of that person's duties will also have a defence in any action taken under this section if they can show that he or she took 'all reasonable steps' to avoid disclosing any information to another person that might identify the discloser.⁹¹⁷

A recipient of a protected disclosure, or any person to whom that disclosure is referred to in the performance of that person's duties, can be held personally liable for any loss suffered by the worker who made the disclosure if information that might identify them is disclosed to another person, and one of the defences in s 16(2) of the 2014 Act do not apply. From the

⁹¹³ Protected Disclosures Act 2014, s 16(1).

⁹¹⁴ *ibid* s 16(3).

⁹¹⁵ *ibid* s 16(2).

⁹¹⁶ *ibid* s 16(2)(b).

⁹¹⁷ *ibid* s 16(2)(a).

initiation of the 2014 Act until the cut-off point for analysis of the case law under the 2014 Act in July 2018, there had been no cases decided under s 16 of the 2014 Act.

5.2(c) *The DPER Guidance*

The DPER Guidance for public bodies also addresses the important issue of ‘Confidentiality/ protection of identity’.⁹¹⁸ It provides that Procedures should confirm that there is an obligation on recipients of disclosures under the 2014 Act to protect the identity of the worker but that this protection is not absolute and that certain exceptions apply, which reflect those contained in s 16(2) of the 2014 Act.⁹¹⁹ The DPER Guidance advises that in respect of their confidentiality obligations, public bodies should address matters such as document security, IT, digital filing, and manual filing.⁹²⁰ The DPER Guidance does not elaborate on how these matters should be addressed. Nonetheless, the DPER Guidance flags these matters so that each public body is aware that such concerns must be addressed. The Article 29 Data Protection Working Party⁹²¹ (‘Data Protection Working Party’) in Opinion 1/2006 explains that an essential requirement of whistleblowing schemes is that disclosures are kept confidential in order to comply with the security of processing operations under art 17 of Directive 95/46/EC⁹²² (now art 32 of the General Data Protection Regulation⁹²³ (‘GDPR’)).⁹²⁴ The Data Protection Working Party states that ‘it is essential that the person who reports be adequately protected, by guaranteeing the confidentiality of the report and

⁹¹⁸ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(11).

⁹¹⁹ *ibid* paras E(11.1) and E(11.4).

⁹²⁰ *ibid* para E(11.1).

⁹²¹ The Article 29 Working Party was established under art 29 of Council Directive (EC) 95/46/EC, which provides for a ‘Working Party on the Protection of Individuals with regard to the processing of Personal Data.’ It consists of a representative from the data protection authority of each EU Member State, the European Data Protection Supervisor, and the EU Commission. The Data Protection Working Party is an independent body that acts in an advisory capacity. The aim of the Data Protection Working Party is to harmonise the application of data protection rules throughout the EU. Its work involves the publication of opinions and recommendations on data protection issues. The European Data Protection Board (‘EDPB’) replaced the Article 29 Data Protection Working Party on 25 May 2018 under Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016]. For more information on the Article 29 Data Protection Working Party, see: <http://ec.europa.eu/newsroom/article29/news.cfm?item_type=1358&tpa_id=6936> accessed 21 April 2018.

⁹²² Council Directive (EC) 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

⁹²³ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 32.

⁹²⁴ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 14.

preventing third parties from knowing his/her identity.’⁹²⁵ This reference to third parties would include the alleged wrongdoer.

The DPER Guidance recommends certain processes that should be implemented to ensure that the protection of identity obligations are guaranteed. The DPER Guidance provides in para E that:

11.2 Where action is to be taken following a protected disclosure, it is recommended that a process is put in place for consulting with the discloser and, where possible, for gaining the informed consent of the discloser, prior to any action being taken that could identify them. This may include when disclosures are being referred by the public body to an external party.

11.3 Where it is decided that it is necessary to disclose information that may or will disclose the identity of the discloser, the discloser should be informed of this decision in advance of the disclosure, except in exceptional cases. The discloser should also be informed of the applicable review process, which may be invoked by the discloser in respect of this decision.⁹²⁶

In complying with the recommendation in para E(11.2) to consult with the discloser and to attempt to gain informed consent to disclose the worker’s identity prior to any action being taken that could identify them, further good practice would be to document any consent or refusal and in the event of a refusal, explain the reasons why disclosure is necessary. The reference in para E(11.3) to informing the discloser of any decision to disclose information that may or will disclose their identity, except in exceptional circumstances, underscores the position in s 16(2) of the 2014 Act that it may be appropriate in some circumstances for the rights of the worker under s 16(1) of the 2014 Act to be curtailed.

An essential condition in para E(11.3) is the requirement to inform the discloser of a review process in respect of any decision taken to disclose their identity. Paragraph E(20) of the DPER Guidance deals with the ‘Review’ requirements in Procedures.⁹²⁷ With regard to the issue of confidentiality, para E(20.1.i) provides that Procedures should include a system for review of ‘Any decision made to disclose the identity of the discloser (except in exceptional

⁹²⁵ *ibid* 15.

⁹²⁶ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) paras E(11.2-11.3).

⁹²⁷ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464, is silent on the issue of ‘Review’.

circumstances).⁹²⁸ Paragraph E(20.2) provides further information in relation to this system of review and proposes that the review should not be undertaken by a person who made the initial decision to disclose information that may/will lead to the revelation of the discloser's identity. Further, the DPER Guidance recommends that where a decision has been taken to disclose any information that may reveal the identity of the discloser, a review should be offered prior to the disclosure of that information. This is good practice but may not be feasible in all cases. There may be an urgency in respect of the wrongdoing disclosed, and any delay could jeopardise any remediation of that wrongdoing. In addition, in small organisations, there may be an insufficient number of staff within the organisation to facilitate a review by an independent person internally, and therefore an external person may have to be engaged at a cost.

Paragraph E(11.4) of the DPER Guidance urges public bodies to include a request in their Procedures that a worker who is concerned that their identity is not being protected to notify their employer of this concern. It is further advised that public bodies include in their Procedures both a commitment to assess and investigate a notification by a discloser that their identity is not being protected and a commitment to take appropriate action where necessary when notification by a discloser that their identity is not being protected is received.

The European Data Protection Supervisor ('EDPS')⁹²⁹ substantiates the position adopted in the DPER Guidance with respect to confidentiality and provides that a discloser's identity 'should never be revealed except in certain exceptional circumstances if the whistleblower authorises such a disclosure, if this is required by any subsequent criminal law proceedings, or if the whistleblower maliciously makes a false statement.'⁹³⁰ The Data Protection Working Party also addresses the protection of the discloser's identity in the context of data rules. The Data Protection Working Party maintains that in exercising their right of access under data protection rights, under no circumstances can the alleged wrongdoer (ie the data

⁹²⁸ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016) para E(20.1.i).

⁹²⁹ The European Data Protection Supervisor is the European Union's independent data protection authority. For more information, see: <<https://edps.europa.eu/>> accessed 21 April 2018.

⁹³⁰ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 4-5. These Guidelines specifically relate to EU institutions and bodies in order to ensure they comply with data protection obligations under Council Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001]. The Guidelines may be regarded as having a general reference to whistleblowing schemes.

subject) obtain information about the identity of the whistleblower.⁹³¹ Nonetheless, despite the protection of the identity of a whistleblower under data protection rules, this protection may be curtailed by an alleged wrongdoer exercising their rights to natural justice and fair procedures. Both of these issues are addressed in more detail later in the chapter.

5.2(d) WRC Code of Practice

The WRC Code of Practice on the 2014 Act⁹³² addresses the issue of protection of identity in each of its three parts. The first part of the WRC Code of Practice gives an overview of the 2014 Act and provides in respect of protection of identity that:

All reasonable steps must be taken to protect the identity of the person making the disclosure and to ensure the disclosures are treated in confidence. The exceptions to this are (a) where the worker making the disclosure has made it clear that he/she has no objection to his/her identity being disclosed and (b) the identity of the person making the disclosure is critical to an investigation of the matter raised. An example of this might be where the worker making the disclosure is called as a witness in the context of an investigation.⁹³³

This explanation in the WRC Code of Practice is worrisome as it does not address all the exceptions in s 16(2) of the 2014 Act and is therefore misleading with regard to when a discloser's identity may be revealed. The second part of the WRC Code of Practice, which deals with the scope and content of Procedures, advises that:

It is important that a worker making a disclosure should be assured that every effort will be made to maintain confidentiality. It is advisable to point out that there may be circumstances where confidentiality cannot be maintained, for example in the context of an investigation. It is important to note however that all reasonable steps must be taken to maintain confidentiality.⁹³⁴

The DPER Guidance is much more robust than the WRC Code of Practice in outlining the steps that should be taken in relation to the protection of the identity of the discloser. The 'Model Whistleblowing Policy', which is an appendix to the WRC Code of Practice, suggests the following approach to the issue of protection of identity:

This organisation is committed to protecting the identity of the worker raising a concern and ensures that relevant disclosures are treated in confidence. The focus will be on the wrongdoing rather than the person making the disclosure. However

⁹³¹ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 14.

⁹³² Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464.

⁹³³ *ibid* [32].

⁹³⁴ *ibid* [50].

there are circumstances, as outlined in the Act, where confidentiality cannot be maintained particularly in a situation where the worker is participating in an investigation into the matter being disclosed. Should such a situation arise, we will make every effort to inform the worker that his/her identity may be disclosed.⁹³⁵

The reference in the ‘Model Whistleblowing Policy’ to the focus being on the wrongdoing rather than on the discloser is a welcome addition. This position underpins the objective of the 2014 Act that the focus needs to be on the message and not on the messenger.⁹³⁶ Nonetheless, the suggested approach in the Model Whistleblowing Policy is far from satisfactory, as it does not set out the extent of the obligation in s 16(1) of the 2014 Act. Nor does it address the entirety of the exceptions in s 16(2) of the 2014 Act. It also fails to provide for consultation with a discloser and an option of review of any decision made to disclose the worker’s identity.

5.2(e) Prescribed persons’ Procedures analysis

In analysing the Procedures of the prescribed persons, nine issues in the DPER Guidance were assessed in relation to ‘Confidentiality/ protection of identity’.⁹³⁷

Of the organisations that had Prescribed Persons’ Procedures only,⁹³⁸ the HEA and the IAASA did not address any of the issues; CORU addressed one issue;⁹³⁹ the PSI addressed two issues;⁹⁴⁰ CRU addressed three issues;⁹⁴¹ and the SFPA addressed all nine issues.

Of those Procedures that were internal only;⁹⁴² CIÉ failed to address any of the issues; the local authorities addressed four of the issues;⁹⁴³ and the SEC and the HEA addressed all nine issues.

⁹³⁵ *ibid* app.

⁹³⁶ Organisation for Economic Co-operation and Development, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 174.

⁹³⁷ See: Appendix 3(b), ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’.

⁹³⁸ CORU; CRU; HEA; IAASA; PSI; and SFPA.

⁹³⁹ See: Appendix 3(c), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,’ F5.

⁹⁴⁰ *ibid* F2.

⁹⁴¹ *ibid* F2, F4, and F5.

⁹⁴² CIÉ; SEC; HEA; Clare CC; Galway CC; Kildare CC; South Dublin CC; and Wexford City Council and CC.

⁹⁴³ See: Appendix 3(d), ‘Findings of Prescribed Persons’ Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,’ F1, F2, F5, and F6.

Of those organisations that had both internal and prescribed persons' Procedures,⁹⁴⁴ the HIA did not address any of the issues; the C&AG and Revenue addressed one issue;⁹⁴⁵ and the Marine Institute and the local authorities addressed all nine issues.

Thus, as can be seen from the results in relation to the nine issues identified in the DPER Guidance regarding 'Confidentiality/ protection of identity', there was evidence of 64% compliance when taking all the Procedures together. Those organisations with both internal and prescribed persons' Procedures obtained 83% compliance, whilst organisations that had internal Procedures only, achieved 53% compliance. Organisations with prescribed persons' Procedures only, obtained a compliance rate of 28%.

It is interesting to note that the HEA's internal Procedures and their Procedures in their capacity as a prescribed person only, have very different rates of compliance regarding this issue. Their internal Procedures were robust, attaining 100% compliance, whilst their prescribed persons' Procedures had 0% compliance. When looking at their overall rate of compliance with the DPER Guidance, their internal Procedures had 84% compliance but had only 20% compliance for their prescribed persons' Procedures. This result highlights the positive use of the DPER Guidance for public bodies but also underscores the necessity for specific guidance for prescribed persons to establish and maintain Procedures.

Of those prescribed persons that responded to the survey undertaken for this research, 89% (sixteen) indicated that they had a system for protecting the identity of the worker who makes a disclosure to them, whilst 5.5% (one) indicated that they did not, and 5.5% (one) indicated that they did not know if they had such a system. Of those prescribed persons who undertook to answer the follow-on question requesting them to briefly explain what steps they take to protect the discloser's identity, there was a range of answers provided.⁹⁴⁶

⁹⁴⁴ C&AG; HIA; Marine Institute; Revenue; Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; and Wicklow CC.

⁹⁴⁵ See: Appendix 3(e), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' F3.

⁹⁴⁶ These answers included: 'Set out in our procedure'; 'It's in our policy on our website'; 'Reporting when shared with others is anonymised by me'; 'We use an external recipient'; 'We haven't had a disclosure yet, but should we have, every effort will be made to protect the identity of the worker involved'; 'Designated Officer for receipt of protected Disclosures will ensure that the name of the discloser remains confidential. File is kept in a locked cabinet in a locked room'; 'The identity of the discloser is not made known unless there are lawful reasons for doing so, e.g. if the investigation cannot be conducted without disclosing their identity'; 'All concerns will be treated, as far as possible, in the strictest confidence and every effort will be made not to reveal the employees identity, if desired. Any disclosure can sent to the protected disclosure email, accessible only by the designated persons (CEO and Chairperson)'; 'Follow the guidelines for dealing with an

The survey responses demonstrate an inconsistent approach being adopted by organisations to protect the discloser's identity. Inconsistency in approaches is not necessarily a deficit but if the approaches are not effective, which arguably a number of the approaches set out in the survey responses would not be, or they are not being applied consistently within the organisation, then this can cause difficulties in relation to the application of the s 16 protection.

In response to the DPER Statutory Review, a number of organisations voiced the difficulty in relation to the scope and nature of the confidentiality obligation. The Department of Education and Skills submitted that 'There appears to be a conflict between the obligations to keep the discloser's identity confidential and the right to know one's accuser. An accused person may have a valid basis not to engage with an investigation where the identity of the person making an allegation is not disclosed.'⁹⁴⁷ Further, the HEA suggested the development of guidelines to address the issue of 'what steps can be taken to accurately convey the substance of a protected disclosure without revealing the worker's identity.'⁹⁴⁸ The HSE submitted that further clarity on how to implement s 16(1) of the 2014 Act would be welcomed and that the obligation to protect the identity of the discloser and to balance this with the need to follow up on a disclosure 'presents difficulties in terms of balance and natural justice'.⁹⁴⁹ Resolve highlighted in its submission that 'There are also acute difficulties being experienced in terms of case management of protected disclosures issues in the event of an investigation being conducted. It can be a significant challenge to protect the identity of the person making the protected disclosure, in light of the facts and assertions that may need to be shared with others for the effective conduct of such an investigation whilst respecting the principles of natural justice.'⁹⁵⁰ Transparency International Ireland ('TII') emphasised in their submission that with regard to s 16 of the 2014 Act 'some employers have told TI Ireland that they are finding it difficult to understand their obligations

investigation'; 'Protected disclosures are treated much the same as any complaint made to us. Where a complaint is received, we follow our established investigation procedures which entail contacting the person/persons against whom an allegation is made, and providing details of the allegation. We protect insofar as possible the identity of the complainant. However, anonymous complaints are not accepted, and the principles of natural justice must also apply'; 'All information is held in a confidential file with restricted access'; 'Meetings held off site, files kept securely locked'; 'It is kept confidential to the prescribed person only'; and 'Name of complainant withheld at all times'.

⁹⁴⁷ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁹⁴⁸ *ibid*

⁹⁴⁹ *ibid*.

⁹⁵⁰ *ibid*.

under the provision. It would, therefore, be important to provide further guidance to those employers struggling to interpret the law and their conflicting duties to uphold the natural rights of the respondent where a protected disclosure is made.⁹⁵¹

Thus, a recurring theme is the difficulty arising for organisations from the interplay between the obligations under s 16 of the 2014 Act to protect the identity of the worker and the obligation under natural justice and fair procedures to respect the rights of the alleged wrongdoer. Therefore, it is arguable that the 2014 Act, the WRC Code of Practice, and the DPER Guidance are ineffective in resolving this conflict for organisations. There are rules deriving from case law in relation to this conflict and these, as well as the conflict with obligations under data protection rules, are explored in more detail below in the ‘Rights of the alleged wrongdoer’ and the ‘Data protection’ sections.

5.3 Anonymous disclosures

5.3(a) *Introduction*

Closely aligned to the issue of confidentiality, is that of anonymous disclosures. Anonymous disclosures are disclosures where the identity of the discloser is withheld by the discloser, whilst confidential disclosures are disclosures where the identity is known by the recipient but is withheld by them. The concerns regarding anonymous disclosures are manifold for an organisation. How can an organisation afford an alleged wrongdoer their rights to natural justice and fair procedures, such as cross-examining the discloser, if it does not know who this person is? Can the organisation carry out a fulsome investigation without the discloser’s participation? How can the organisation protect a discloser from retaliation if it is not aware of who the discloser is?

Anonymous disclosures are not explicitly provided for in the 2014 Act. However, in the original carnation of the 2014 Act, the Draft Heads of the Protected Disclosures in the Public Interest Bill 2012⁹⁵² (‘Draft Heads’), anonymous disclosures were explicitly excluded. Head 11 of the Draft Heads provided that ‘A disclosure made anonymously shall not be a protected disclosure for the purposes of this Act.’ In relation to Head 11, the explanatory note to the legislation explained that both Heads 15 (immunity from criminal proceedings) and 16 (confidentiality) are important safeguards to protect the confidentiality of a worker making

⁹⁵¹ *ibid.*

⁹⁵² The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, Head 11.

a protected disclosure. It stated that it was not considered appropriate or practical that a worker could seek to avail of the protections provided under the legislation on the basis of having made an anonymous disclosure.⁹⁵³ The Draft Heads only afforded protection to workers who made a confidential disclosure.⁹⁵⁴

The issue of excluding anonymous disclosures from the ambit of the Draft Heads was discussed at a number of sittings of the Joint Committee on Finance, Public Expenditure and Reform ('Committee'). The issue was raised by the National Union of Journalists who highlighted that whistleblowers might speak to journalists on an anonymous basis.⁹⁵⁵ It was also raised by TII who argued that 'Most people want to report anonymously' and recommended that 'the legislation protects a worker making an anonymous disclosure where the worker can be identified as the source of a protected disclosure.'⁹⁵⁶ The Committee issued a report on foot of the submissions made to it on the Draft Heads, and it acknowledged therein that the 'issue of confidentiality versus anonymity must be examined.'⁹⁵⁷ Following the release of the report, the Protected Disclosures Bill 2013 was published which referred only to the issue of confidentiality⁹⁵⁸ but made no mention of anonymous disclosures.

5.3(b) *The DPER Guidance*

Although the 2014 Act does not refer explicitly to anonymous disclosures, the DPER Guidance addresses this issue in para E(12). The DPER Guidance recommends that Procedures should distinguish between confidentiality and anonymity as these terms can cause confusion for both disclosers and recipients.⁹⁵⁹ The DPER Guidance emphasises that public bodies should give a commitment to act on information disclosed anonymously, to the extent that it is possible.⁹⁶⁰ This advice is clarified further by a recommendation that the Procedures should include a statement that investigations of such disclosures may be restricted and that, in the event of retaliation against the discloser, it may be difficult or

⁹⁵³ Explanatory Note to the Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, Head 11.

⁹⁵⁴ The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, Head 16.

⁹⁵⁵ Joint Committee on Finance, Public Expenditure and Reform Deb 23 May 2012.

⁹⁵⁶ Joint Committee on Finance, Public Expenditure and Reform Deb 13 June 2012.

⁹⁵⁷ Joint Committee on Finance, Public Expenditure and Reform, *Report on hearings in relation to the Scheme of the Protected Disclosures in the Public Interest Bill, 2012* (31/FPER/010, 2012) 12.

⁹⁵⁸ Protected Disclosures Bill 2013, s 16.

⁹⁵⁹ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016) para E(12.1).

⁹⁶⁰ *ibid.*

impossible to provide protection if anonymity is maintained.⁹⁶¹ The DPER Guidance also stresses that Procedures should make it clear that unless a discloser reveals their identity, they will not be able to avail of the protections under the 2014 Act.⁹⁶²

5.3(c) WRC Code of Practice

The first part of the WRC Code of Practice provides that disclosures can be made anonymously.⁹⁶³ Importantly the WRC Code of Practice sets out the rationale behind this position and explains that the focus needs to be on the alleged wrongdoing and not on the discloser. The WRC Code of Practice states:

Yes, a disclosure may be made anonymously. It should be noted that a disclosure made anonymously may potentially, of itself, present a barrier to the effective internal investigation of the matter reported on.

Focus should be on the reported wrongdoing and not on the person making the disclosure.⁹⁶⁴

Further, in the third part of the WRC Code of Practice, the ‘Model Whistleblowing Policy’, it provides that anonymous disclosures can be made but encourages confidential disclosures, stating that:

A concern may be raised anonymously. However on a practical level it may be difficult to investigate such a concern. We would encourage workers to put their names to allegations, with our assurance of confidentiality where possible, in order to facilitate appropriate follow-up. This will make it easier for us to assess the disclosure and take appropriate action including an investigation if necessary.⁹⁶⁵

5.3(d) Prescribed persons’ Procedures analysis

In analysing the Procedures of the prescribed persons in light of the DPER Guidance, four issues were assessed in relation to ‘Anonymous disclosures’.⁹⁶⁶

⁹⁶¹ *ibid* para E(12.2).

⁹⁶² *ibid* para E(12.1).

⁹⁶³ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464, [33]-[34].

⁹⁶⁴ *ibid*.

⁹⁶⁵ *ibid* app.

⁹⁶⁶ See: Appendix 3(b), ‘Coding of DPER Checklist for Prescribed Persons’ Protected Disclosures Procedures’.

Of the organisations that had prescribed persons' Procedures only,⁹⁶⁷ CRU, the HEA, the IAASA, and the PSI do not address the issue of anonymous disclosures at all in their Procedures; CORU includes one issue;⁹⁶⁸ and the SFPA includes two issues.⁹⁶⁹

Of those Procedures that were internal only,⁹⁷⁰ CIÉ does not include any information on anonymous disclosures in their Procedures; the local authorities include one issue;⁹⁷¹ and both the SEC and the HEA include all of the issues regarding anonymous disclosures.

Of those organisations that had both internal and prescribed persons' Procedures,⁹⁷² neither the C&AG nor Revenue includes the issue of anonymous disclosures in their Procedures; the HIA includes one issue;⁹⁷³ the local authorities include two issues;⁹⁷⁴ and the Marine Institute includes all four issues.

Therefore, the results in relation to the four issues identified in the DPER Guidance regarding 'Anonymous disclosures' indicate 36% compliance when taking all the Procedures together. This is a very low compliance rate. Those organisations with both internal and prescribed persons' Procedures obtained 45% compliance, whilst organisations that had internal Procedures only, achieved 41% compliance. Organisations with prescribed persons' Procedures only, obtained a compliance rate of 13%.⁹⁷⁵

The difficulty experienced by organisations in relation to anonymous disclosures was highlighted by the Department of Education and Skills in its submission to the DPER Statutory Review, where it stated:

There is potential for confusion amongst some persons making disclosures between keeping a discloser's identity confidential and an anonymous disclosure. It would be helpful if the Act drew the distinction between the protections (if any) afforded to

⁹⁶⁷ CORU; CRU; HEA; IAASA; PSI; and SFPA.

⁹⁶⁸ See: Appendix 3(c), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' G2.

⁹⁶⁹ *ibid* G2 and G4.

⁹⁷⁰ CIÉ; SEC; HEA; Clare CC; Galway CC; Kildare CC; South Dublin CC; and Wexford City Council and CC.

⁹⁷¹ See: Appendix 3(d), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' G3.

⁹⁷² C&AG; HIA; Marine Institute; Revenue; Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; and Wicklow CC.

⁹⁷³ See: Appendix 3(e), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' G1.

⁹⁷⁴ *ibid* G3 and G4.

⁹⁷⁵ The CRU, HEA, IAASA, PSI, Revenue, C&AG, and CIÉ have complete non-compliance, whilst CORU, SFPA, HIA, and all the local authorities only have partial compliance. The SEC, HEA (internal), and the Marine Institute are all examples of good practice.

“anonymous” disclosures” and “confidential” disclosures”. A number of the disclosures received to date have been made anonymously, however these present a number of difficulties in terms of conducting an investigation and may be due to a misunderstanding of the purpose of the Act i.e. the protections of the worker against penalisation – if a disclosure is made anonymously the employer does not know the identity of the worker so cannot offer protections.

There are challenges to assessing and investigating matters raised anonymously. While the Protected Disclosure Act does not place a requirement to act on any disclosures, anonymous or otherwise, in some instances, allegations are made anonymously to a Minister which are of sufficient importance to warrant investigation, however such disclosures may prove difficult to investigate as it is not always possible to fully investigate the matters highlighted or to establish supporting evidence.⁹⁷⁶

In addition, the HSE emphasised in its submission to the DPER Statutory Review that there is difficulty in terms of ‘balance and natural justice’ in circumstances where the disclosure is made anonymously.⁹⁷⁷

5.3(e) *The case for and against anonymous disclosures*

The position adopted in the DPER Guidance reflects the assertion by the OECD that there should be protection of identity through the availability of anonymous reporting⁹⁷⁸ Transparency International also promotes the affording of protection to anonymous disclosures.⁹⁷⁹ Further, the UK Department for Business, Energy and Industrial Strategy provides that it is good practice for managers to have a facility for anonymous disclosures.⁹⁸⁰ There is evidence of anonymous disclosures being explicitly provided for on statute in other jurisdictions, eg, Australia,⁹⁸¹ Hungary,⁹⁸² Italy,⁹⁸³ New Zealand,⁹⁸⁴ Serbia,⁹⁸⁵ and

⁹⁷⁶ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

⁹⁷⁷ *ibid.*

⁹⁷⁸ Organisation for Economic Co-operation and Development, ‘G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers’ (OECD 2011) 31.

⁹⁷⁹ Transparency International, ‘International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest’ (TI 2013) 6, provides that ‘full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.’

⁹⁸⁰ Department for Business, Energy and Industrial Strategy, ‘Whistleblowing Guidance for Employers and Code of Practice’ (BEIS March 2015) 8.

⁹⁸¹ Public Interest Disclosures Act 2013, s 28(2).

⁹⁸² Complaints and Announcements of Public Concern Act (the ‘Whistleblower Act’) 165 of 2013.

⁹⁸³ Legislative Decree 2015/72, s 18; Legislative Decree 1993/285, s 52-bis.

⁹⁸⁴ Protected Disclosures Act 2000, s 19(3)(a).

⁹⁸⁵ Law on the Protection of Whistleblowers Act, no 2014/128, art 13.

Singapore.⁹⁸⁶ However, Vandekerckhove and Lewis explain that although the possibility of anonymous reporting might make it easier for individuals to raise an issue, confidential reporting facilitates investigations.⁹⁸⁷ This is a recurring theme in the reasoning against the facilitating of anonymous reporting. As a result, certain organisations do not actively promote the inclusion of anonymous reporting provisions. For example, the British Standards Institute's 'Whistleblowing Arrangements Code of Practice' advises against anonymous whistleblowing;⁹⁸⁸ the Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", stresses the importance of confidential reporting but makes no mention of anonymous reporting;⁹⁸⁹ and the draft EU Commission Directive on whistleblowing does not mention the possibility of allowing for anonymous disclosures.⁹⁹⁰ Further, the Data Protection Working Party advises against the receipt of anonymous disclosure, stating 'As a general rule, the Data Protection Working Party considers that only identified reports should be communicated through whistleblowing schemes'⁹⁹¹ in order to ensure that personal data is collected fairly. The Data Protection Working Party highlights a number of reasons why anonymous disclosures are not preferred:

- being anonymous does not stop others from successfully guessing who raised the concern;
- it is harder to investigate the concern if people cannot ask follow-up questions;
- it is easier to organise the protection of the whistleblower against retaliation, especially if such protection is granted by law, if the concerns are raised openly;
- anonymous reports can lead people to focus on the whistleblower, maybe suspecting that he or she is raising the concern maliciously;
- an organisation runs the risk of developing a culture of receiving malevolent reports;

⁹⁸⁶ Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A), s 39; Terrorism (Suppression of Financing Act) (Cap 325), ss 8(1) and 10(1).

⁹⁸⁷ Wim Vandekerckhove and David Lewis, 'The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines' (2012) 108(2) Journal of Business Ethics 253, 255.

⁹⁸⁸ British Standards Institute, 'Whistleblowing Arrangements Code of Practice' (BSI 2008) 14.

⁹⁸⁹ Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", para 6.2.1.2.

⁹⁹⁰ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD).

⁹⁹¹ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 11. This position is reflected in the Guidelines issued by the European Data Protection Supervisor where it stated 'In principle, whistleblowing should not be anonymous. Whistleblowers should be invited to identify themselves not only to avoid abuse of the procedure but also to allow their effective protection against any retaliation. This will also allow a better management of the file if further information would be necessary.' European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 6.

-the social climate within the organisation could deteriorate if employees are aware that anonymous reports concerning them may be filed through the scheme at any time.⁹⁹²

The Data Protection Working Party does acknowledge that anonymous disclosures are a reality for organisations and that workers may not always be in a position to make a confidential disclosure or have the psychological disposition to do so.⁹⁹³ It recommends that anonymous disclosures should be an exception to the rule and that whistleblowing schemes should be developed in such a manner that anonymous disclosures are not encouraged as the ‘usual way’ to make a disclosure.⁹⁹⁴ The Data Protection Working Party advises that an organisation should not advertise that anonymous disclosures can be made through its whistleblowing scheme.⁹⁹⁵ Lewis, however, points out that if a discloser wishes to make their disclosure without revealing their identity, then it is better that Procedures state that making a disclosure anonymously is preferable to remaining silent about alleged serious wrongdoing.⁹⁹⁶

A significant complication with the original approach in the Draft Heads to exclude anonymous disclosures was s 301 of the US Sarbanes-Oxley Act 2002 (‘SOX’) which already required companies listed in the US and their subsidiaries to establish protocols for anonymous reporting (there are approximately 700 US owned firms operating in Ireland that employ about 150,000 people⁹⁹⁷).⁹⁹⁸ The proposal under the Draft Heads to exclude anonymous disclosures from the ambit of the legislation would have been likely to create confusion and deny many Irish and migrant workers the same rights as those subject to SOX to make a protected disclosure. However, it is important to note that a decision by the French data protection authority (‘CNIL’) in 2005 declined to approve the SOX helplines of two US

⁹⁹² Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 10-11.

⁹⁹³ *ibid* 11.

⁹⁹⁴ *ibid*.

⁹⁹⁵ *ibid*.

⁹⁹⁶ David Lewis, ‘Whistleblowing and data protection principles: Is the road to reconciliation really that rocky?’ (2011) 2(1) *European Journal of Law and Technology* 5 <<http://ejlt.org/article/view/53/119>> accessed 31 March 2019.

⁹⁹⁷ US Department of State, ‘US Relations with Ireland’ (*US Department of State*) <www.state.gov/r/pa/ei/bgn/3180.htm> accessed 25 April 2018.

⁹⁹⁸ The Sarbanes-Oxley Act was passed by US Congress in 2002 after the Enron and WorldCom scandals in order to protect employees of publicly traded companies who report violations of Securities and Exchange Commission regulations or any provision of federal law relating to fraud against the shareholders. Sarbanes-Oxley Act of 2002, s 301(4)(B) provides that in relation to complaints, each audit committee shall establish procedures ‘for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.’

companies partly on the basis that they provided for anonymous reporting.⁹⁹⁹ CNIL held that the possibility of anonymous ‘ethics alert’ could only increase the risk of slanderous accusations.¹⁰⁰⁰ The CNIL advocated that companies should not encourage anonymous reporting and that although it is not prohibited, it should be the exception.¹⁰⁰¹

This position is at odds with the position adopted in the DPER Guidance, where it advises that Procedures should give a commitment to act on the information disclosed anonymously, to the extent that it is possible.¹⁰⁰² The Data Protection Working Party takes the view that a worker should be informed that their identity will be protected and that they will not be penalised for making a disclosure, but if despite these assurances a worker still wants to make an anonymous disclosure then it should be processed through the whistleblowing scheme.¹⁰⁰³ The DPER Guidance includes assurances of confidentiality, protection from reprisal, and that anonymous disclosures will be assessed and investigated. This approach follows the view expressed in the WWTW Guide, which provides that organisations should accept anonymous disclosures and give a commitment that they will be acted on.¹⁰⁰⁴ The WWTW Guide explains that flexibility in disclosure options facilitates the reporting of wrongdoing, especially in encouraging ‘risk-averse complainants’ to come forward.¹⁰⁰⁵ The WWTW Guide recommends that in order to get around any limitations on investigating anonymous disclosures, organisations should state in their Procedures that a commitment to investigate anonymous disclosures will only apply to those disclosures that contain a

⁹⁹⁹ National Commission of Computing and Freedoms, ‘Délibération relative à une demande d’autorisation de McDonald’s France pour la mise en oeuvre d’un dispositif d’intégrité professionnelle’ (Délibération n°2005-110, 26 May 2005) <www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000017653326> accessed 24 December 2018.

¹⁰⁰⁰ *ibid.*

¹⁰⁰¹ National Commission of Computing and Freedoms ‘Deliberation No. 2017-191 of 22 June 2017 amending Resolution No 2005-305 of 8 December 2005 on the single authorization for the automatic processing of personal data implemented in the framework of professional warning systems (AU- 004)’ (Deliberation n ° 2017-191 of June 22, 2017) art 2 <www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000035459127&fastReqId=386645448&fastPos=1> accessed 24 December 2018.

¹⁰⁰² Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(12). This position is echoed in the DPER Statutory Review Report where, in response to a request for guidance on how to deal with anonymous disclosures, it stated ‘Internal procedures should clarify that anonymous disclosures should be dealt with similarly to any other disclosure, i.e. as assessment of the issue and an investigation if appropriate.’ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 41.

¹⁰⁰³ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 11.

¹⁰⁰⁴ Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 48.

¹⁰⁰⁵ *ibid.*

sufficient amount of information to facilitate such an investigation.¹⁰⁰⁶ The WWTW Guide suggests that Procedures should explain that an appropriate level of information is necessary in a disclosure, as the organisation will be prohibited from consulting further with the discloser to gain further information or clarification if the disclosure is made anonymously.¹⁰⁰⁷

It is worth noting that the rate of disclosures being made anonymously can vary. For example, according to the findings of the WWTW survey, of the Australian agencies surveyed in the study (n=304), 68.1% said that they would accept anonymous disclosures, whilst 28% indicated they would not, with a 39% non-response rate. Of those agencies that accepted anonymous disclosures, the estimated proportion of anonymous disclosures was 5.46%.¹⁰⁰⁸ However, according to the Irish IAW survey, 33% of employees surveyed (n=878) said that a key influencing factor for reporting wrongdoing in the workplace is if they could report anonymously.¹⁰⁰⁹ If an organisation is receiving high rates of anonymous disclosures, this may be a warning sign to the organisation that there is a serious issue with the culture in the organisation that workers do not feel safe in raising their concerns openly. As the Ethics Resource Centre highlights, their survey data shows that ‘employees would rather sacrifice anonymity and report to someone they know and trust’.¹⁰¹⁰

Despite the advice to organisations that anonymous disclosures are to be accepted by them, organisations need to be cognizant of the risk of injustice to the person who is the subject of the disclosure under natural justice and fair procedures. As discussed below, these rights may entail a right to cross-examine the discloser; however, if the identity of the discloser is not known by the organisation, then such a right cannot be afforded to the alleged wrongdoer. There is also the risk that maliciously false claims could be made against an individual so an organisation must implement processes that reduce the risk to an alleged wrongdoer. These are significant difficulties for the organisation. It may not be enough for an organisation to state in their Procedures that maliciously false disclosures will be subject to appropriate sanctions, as clearly, if a person makes a disclosure anonymously, they will assume that it will be unlikely that they would be subject to such sanctions when they cannot be identified

¹⁰⁰⁶ *ibid.*

¹⁰⁰⁷ *ibid* 51.

¹⁰⁰⁸ *ibid* 48.

¹⁰⁰⁹ Transparency International Ireland, ‘Speak Up Report 2017’ (TII 2017) 39.

¹⁰¹⁰ Ethics Resource Center, *Inside the Mind of a Whistleblower A Supplemental Report of the 2011 National Business Ethics Survey* (Ethics Resource Center 2012) 11.

as the source of the disclosure. In that regard, what would be required is that recipients of disclosures receive training in identifying genuine disclosures of alleged wrongdoing and are advised that if they have any doubt as to the validity of the concern raised, that the subject of the disclosure is afforded all necessary protections.

5.4 Rights of the alleged wrongdoer

5.4(a) *Introduction*

The 2014 Act is silent on the rights of an alleged wrongdoer. The Data Protection Working Party notes in their Opinion 1/2006 that ‘while existing regulations and guidelines on whistleblowing are designed to provide specific protection to the person making use of the whistleblowing scheme (“the whistleblower”), they never make any particular mention of the protection of the alleged wrongdoer’.¹⁰¹¹ Nonetheless, there is evidence of the rights of the alleged wrongdoer being included in whistleblowing legislation in other jurisdictions, eg Canada,¹⁰¹² Hungary,¹⁰¹³ Italy,¹⁰¹⁴ Kosovo,¹⁰¹⁵ and Serbia.¹⁰¹⁶ In Ireland, although the 2014 Act does not include a provision relating to the alleged wrongdoer, the DPER Guidance does address this issue.¹⁰¹⁷

5.4(b) *The DPER Guidance*

The DPER Guidance advises that appropriate protection is afforded to the alleged wrongdoer and that natural justice and fair procedures are respected.¹⁰¹⁸ It gives limited advice regarding how to balance these rights with that of the discloser not to have their identity disclosed, subject to the statutory exceptions. The DPER Guidance acknowledges that complying with the general principles of natural justice and fair procedures will be a particular challenge when the disclosure is made anonymously.¹⁰¹⁹ The DPER Guidance explains that:

¹⁰¹¹ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 6.

¹⁰¹² Public Servants Disclosure Protection Act 2005, ss 11(1)(c).

¹⁰¹³ Complaints and Announcements of Public Concern Act (the ‘Whistleblower Act’) 165 of 2013.

¹⁰¹⁴ Legislative Decree 2015/72, s 18; Legislative Decree 1993/285, s 52-bis.

¹⁰¹⁵ Draft Law on Protection of Whistleblowers, art 20(2).

¹⁰¹⁶ Law on the Protection of Whistleblowers Act, no 2014/128, art 19.

¹⁰¹⁷ Government Reform Unit, Department of Public Expenditure and Reform, ‘Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act’ (DPER 2016) para E(16).

¹⁰¹⁸ *ibid* para E(16.1).

¹⁰¹⁹ *ibid* para E(16.2).

16.3 Whether it is necessary to disclose the identity of the discloser, or not, will depend upon the facts of the case, which may include, for example, whether any allegation is made against an individual and the nature of that allegation. The disclosure recipient will need to consider such matters when determining whether a protected disclosure can be investigated and the nature of any investigation. Persons making a protected disclosure should be encouraged to frame it in terms of information that has come to their attention rather than seeking to draw conclusions about particular individuals or specific offences.

16.4 While an investigation under the Procedures is different to a grievance, dignity at work or disciplinary investigation, there are certain key themes and common features and the nature of any investigation under the Procedures will be informed by the procedures that normally apply in the public sector body when other allegations are investigated. The public body will need to be mindful that, if the investigation comes to the conclusion that some form of wrongdoing has occurred, the report that issues may need to be used in a subsequent disciplinary process. As a result, it should be able to withstand scrutiny as part of any disciplinary process and there should, where possible, be strong commonality of approach between such procedures.¹⁰²⁰

The DPER Guidance highlights a number of difficulties for organisations, such as balancing the obligations to protect the discloser's identity with the alleged wrongdoer's rights to natural justice and fair procedures, but it does not offer solutions to these issues. Potential solutions are addressed later in this chapter.

5.4(c) Irish Congress of Trade Unions, 'Drafting a Whistleblowing Policy, Guidelines for Trade Union Negotiators on The Protected Disclosures Act 2014'

The WRC Code of Practice is silent on the issue of the rights of the alleged wrongdoer. The Irish Congress of Trade Unions ('ICTU') produced a guide ('ICTU guide') to provide trade union negotiators with pointers to key provisions in the 2014 Act and to assist them in negotiations with employers who are interested in having a whistleblowing policy in place.¹⁰²¹ The ICTU guide addresses the position of an alleged wrongdoer and provides as follows:

The Protected Disclosures Act 2014 does not in any way change the existing rights of workers who are subject of an allegation. In particular, workers who are the subject of a protected disclosure must have their right to natural justice and fair procedures upheld. In this respect the LRC Code of Practice: Grievance and Disciplinary Procedures S.I. NO. 146 OF 2000 is central. Fair procedure principles require that the allegations or complaints be set out in writing, that the source of the allegations

¹⁰²⁰ *ibid* paras E(16.3-16.4).

¹⁰²¹ Irish Congress of Trade Unions, 'Drafting a Whistleblowing Policy, Guidelines for Trade Union Negotiators on The Protected Disclosures Act 2014' (ICTU August 2014).

or complaint be given or that the employee concerned be allowed to confront or question witnesses. The worker must be given the opportunity to be represented.¹⁰²²

This information is incorrect. As will be seen later in this chapter, the rights to natural justice and fair procedures are not necessarily the same in the context of a protected disclosure as in other grievance procedures, for example, in the context of a protected disclosure, the source of the allegation does not always have to be given to the alleged wrongdoer.

5.4(d) *Prescribed persons' Procedures analysis*

In analysing the Procedures of the prescribed persons, three issues in the DPER Guidance were assessed in relation to 'Protection of the rights of Respondents'.¹⁰²³

Of the organisations that had prescribed persons' Procedures only,¹⁰²⁴ the SFPA was the only organisation to include information on this issue in their Procedures and addressed the first two issues from the DPER Guidance.¹⁰²⁵

Of those Procedures that were internal only,¹⁰²⁶ the HEA addressed one issue;¹⁰²⁷ the local authorities also addressed one issue;¹⁰²⁸ and the SEC addressed two issues.¹⁰²⁹

Of those organisations that had both internal and prescribed persons' Procedures,¹⁰³⁰ the HIA and Revenue contained none of the issues in their Procedures; the C&AG and the local authorities included one issue;¹⁰³¹ and the Marine Institute included all three issues in their Procedures.

Thus, as can be seen from the results in relation to the three issues identified in the DPER Guidance regarding 'Protection of the rights of Respondents', there was evidence of only

¹⁰²² *ibid* 8.

¹⁰²³ See: Appendix 3(b), 'Coding of DPER Checklist for Prescribed Persons' Protected Disclosures Procedures'.

¹⁰²⁴ CORU; CRU; HEA; IAASA; PSI; and SFPA.

¹⁰²⁵ See: Appendix 3(c), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' K1 and K2.

¹⁰²⁶ CIÉ; SEC; HEA; Clare CC; Galway CC; Kildare CC; South Dublin CC; and Wexford City Council and CC.

¹⁰²⁷ See: Appendix 3(d), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' K2.

¹⁰²⁸ *ibid* K1.

¹⁰²⁹ *ibid* K2 and K3.

¹⁰³⁰ C&AG; HIA; Marine Institute; Revenue; Carlow CC; Cavan CC; Fingal CC; Galway City Council; Kerry CC; Kilkenny CC; Limerick City Council and CC; Longford CC; Monaghan CC; Sligo CC; Westmeath CC; and Wicklow CC.

¹⁰³¹ See: Appendix 3(e), 'Findings of Prescribed Persons' Protected Disclosures Procedures using the DPER Checklist for Prescribed Persons,' K2.

29% compliance when taking all the Procedures together. Those organisations with both internal and prescribed persons' Procedures obtained 33% compliance, whilst organisations that had internal Procedures only, also obtained 33% compliance. Organisations with prescribed persons' Procedures only, obtained a compliance rate of 11%. Eight prescribed persons failed to include any information on this issue in their Procedures.¹⁰³² All the local authorities, the HEA (internal), and the C&AG included one issue each. The SFPA and the SEC included two of the issues, but again the Marine Institute was best in class for their compliance with the requirements of the DPER Guidance.

However, it must be emphasised, that although the Marine Institute's Procedures reflect the conditions of the DPER Guidance, the DPER Guidance is silent on some matters, such as the rights of the alleged wrongdoer under data protection rules. Therefore, whilst the Procedures of an organisation may comply with the DPER Guidance, organisations will still have to weigh up the rights of each alleged wrongdoer on a case-by-case situation and should ensure that their Procedures address the issues relating to the rights of an alleged wrongdoer, that are outlined below.

5.4(e) *Natural justice and fair procedures*

In order to balance the rights of the discloser and the rights of an alleged wrongdoer, the organisation will need to have an understanding of what constitutes natural justice and fair procedures and when such rights apply to an alleged wrongdoer. The WWTW Guide highlights that the issue of natural justice can create considerable difficulties for organisations stating that:

Misunderstandings around the requirements of natural justice are a source of confusion and practical difficulty in the area of maintaining confidentiality. When an allegation is made against a person, natural justice principles require that the person be made aware of the allegations against them if an adverse decision is to be made. Many managers, however, incorrectly assume that natural justice obligations require the identity of the person making the report to be revealed. In small work groups, making someone aware of the allegations against them can also inevitably mean signalling the identity of the reporter.¹⁰³³

However, this statement is not entirely accurate. It is correct to say that at the receipt stage, it may not be necessary to inform the subject of the disclosure of the source of the disclosure;

¹⁰³² CIÉ; CORU; CRU; HEA; IAASA; PSI; Revenue; and HIA.

¹⁰³³ Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 65.

however, it may be required at the investigation and disciplinary stages of the disclosure, as discussed below.

5.4(e)(i) *What are natural justice and fair procedures?*

The right to fair procedures is derived from an implied right in Bunreacht na hÉireann 1937 ('Irish Constitution') which provides in Article 40.3.1° that 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'¹⁰³⁴ In addition to the constitutional right to fair procedures, there are three further sources of fair procedures:¹⁰³⁵ (i) an implied term of a contract of employment;¹⁰³⁶ (ii) the Unfair Dismissals Acts 1977-2001;¹⁰³⁷ and (iii) some particular statutory form of procedural protection from dismissal for those public servants excluded from the Unfair Dismissal Acts 1977-2001.¹⁰³⁸

Historically, principles of natural justice were only afforded to office-holders or officers who could be removable for cause but not to office-holders or officers dismissable at pleasure or to employees.¹⁰³⁹ However, the Supreme Court in *Garvey v Ireland*¹⁰⁴⁰ held that this distinction between office-holders/officers holding office at pleasure and those that could be dismissed for cause was no longer applicable and that principles of natural justice applied to any decision to dismiss. Further, in *Gunn v Bord an Cholaíste Náisiúnta Ealaíne is Deartha*,¹⁰⁴¹ Mr Justice Walsh held that the principles of natural justice apply without regard to the status of the person entitled to benefit from them.¹⁰⁴²

Traditionally, what constituted fair procedures could be found in the maxims *nemo iudex in causa sua*, ie the decision maker should not be biased, and *audi alteram partem*, ie the

¹⁰³⁴ Art 40.3.1°.

¹⁰³⁵ Frances Meenan, *Employment Law* (Round Hall 2014) 699.

¹⁰³⁶ *Glover v BLN Ltd* [1973] IR 388 (SC).

¹⁰³⁷ The Unfair Dismissals Acts 1977-2001 do not apply to all categories of employees, ie members of the defence forces, local authority managers, or persons employed by or under the State who are still dismissable by the government.

¹⁰³⁸ For example, Local Government Act 1941 and Universities Act 1997.

¹⁰³⁹ Frances Meenan, *Employment Law* (Round Hall 2014) 884.

¹⁰⁴⁰ *Garvey v Ireland* [1981] IR 75 (HC).

¹⁰⁴¹ *Gunn v Bord an Cholaíste Náisiúnta Ealaíne is Deartha* [1990] 2 IR 168 (SC).

¹⁰⁴² *ibid* 181. Mr Justice Walsh stated in this regard 'There is one other matter I wish to refer to, to clear up what appears to be misapprehension concerning the application of the rules of natural justice or of constitutional justice. The application of these rules does not depend upon whether the person concerned is an office-holder as distinct from being an employee of some other kind.'

alleged wrongdoer ought to know the case he has to meet and have a reasonable opportunity to put their side of the case.¹⁰⁴³

In the decision of *Re Haughey*,¹⁰⁴⁴ Ó Dálaigh CJ, although addressing the rights of the applicant when appearing before the Dáil's Public Accounts Committee, held that the following fair procedural safeguards should be afforded to an alleged wrongdoer during an oral hearing:

(a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.¹⁰⁴⁵

Further guidance as to what constitutes fair procedures can be drawn from the Code of Practice on Grievance and Disciplinary Procedures,¹⁰⁴⁶ which provides that the procedures for dealing with disciplinary and grievance issues, whilst reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures.¹⁰⁴⁷ Paragraph 4(7) of the Code of Practice on Grievance and Disciplinary Procedures provides that these principles of natural justice and fair procedures may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given, or that the employee concerned be allowed to confront or question witnesses.

The elements of natural justice and fair procedures in the context of whistleblowing schemes are addressed below.

¹⁰⁴³ Michael Forde, *Constitutional Law* (2nd edn, First Law Limited 2004) 521.

¹⁰⁴⁴ *Re Haughey* [1971] IR 217 (SC).

¹⁰⁴⁵ *ibid* 263; Mr Justice McMahon in *Khan v HSE* [2008] IEHC 234 described what is meant by fair procedures and stated 'What does fair procedures mean? At the very minimum it means that the person at whom a charge is levelled has proper notice of the charge; that he has proper opportunity to take legal advice and to prepare for hearing; that no one is to be a judge in their own cause; (*nemo judex in causa sua*) that both parties are given a full opportunity to be heard (*audi alteram partem*) and that the judge is free from bias. Moreover, it is clichéd law that not only must these principles be adhered to, but they must be seen to be adhered to. Justice must be seen to be done.'

¹⁰⁴⁶ Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000, SI 2000/146.

¹⁰⁴⁷ *ibid* [4(6)], provides that the general principles of natural justice and fair procedures include: (i) That employee grievances are fairly examined and processed; (ii) that details of any allegations or complaints are put to the employee concerned; (iii) that the employee concerned is given the opportunity to respond fully to any such allegations or complaints; (iv) that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and (v) that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors, circumstances.

5.4(e)(ii) *At what stage of the disclosures process do natural justice and fair procedures apply?*

Organisations must not only be satisfied that they know what rights the alleged wrongdoer is entitled to but also at what stage of the process the alleged wrongdoer is afforded those rights. In the seminal decision of *Re Haughey*,¹⁰⁴⁸ Ó Dálaigh CJ sitting in the Supreme Court, outlined when the principles of natural justice apply, stating that:

[I]n proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.¹⁰⁴⁹

The law in Ireland is currently in a state of flux due to the decision of Mr Justice Eagar sitting in the High Court in 2017 in the case of *Lyons v Longford Westmeath Education and Training Board*.¹⁰⁵⁰ The High Court in *Lyons* held that an alleged wrongdoer is entitled to both legal representation and the right to cross-examine the complainant, through counsel, if an investigation extends further than simply investigating the allegations and deciding whether there is a case to answer or not. The High Court held that an alleged wrongdoer is entitled to such fair procedures where a complaint is made which could impinge on an individual's good name, as protected under Article 40.3.2° of the Irish Constitution,¹⁰⁵¹ and where it could result in a dismissal.¹⁰⁵²

¹⁰⁴⁸ *Re Haughey* [1971] IR 217 (SC).

¹⁰⁴⁹ *ibid* 264.

¹⁰⁵⁰ *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272. In January 2018, because of the evolving case law in this area, Mr Pat Breen ('Breen'), TD, Minister of State for Trade, Employment, Business, EU Digital Single Market and Data Protection, asked the Workplace Relations Commission and the Health and Safety Authority to undertake a review of their Codes of Practice on Bullying in the Workplace. Breen said 'It is timely to have a review carried out and I have asked the WRC and the HSA to work together to examine the possibility of developing a single Code of Practice for Bullying in the Workplace ... It is crucial that best practice in relation to bullying in the workplace is adhered to and regularly revisited and I want to take whatever steps I can in this important area insofar as the bodies for which I have policy responsibility are concerned.' Merriion Street, 'Minister Breen announces review of Codes of Practice on Bullying in the Workplace' (*Merriion Street*, 17 January 2018) <https://merriionstreet.ie/en/NewsRoom/Releases/Minister_Breen_announces_review_of_Codes_of_Practice_on_Bullying_in_the_Workplace.html> accessed 4 April 2018.

¹⁰⁵¹ Art 40.3.2° provides that 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

¹⁰⁵² *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272 [95].

In relation to the finding of a right to cross-examine at the investigatory stage, Mr Justice Eagar relied on the Supreme Court decision of *Borges v Fitness to Practice Committee*,¹⁰⁵³ where Keane CJ stated:

It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court in *In re Haughey* [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely.¹⁰⁵⁴

Mr Justice Eagar emphasised in his decision that cross-examination is a 'vital safeguard to ensure fair procedure' where an investigation can lead to dismissal¹⁰⁵⁵ and noted further that Keane CJ in *Borges* stated that:

It is sufficient to say that the applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person.¹⁰⁵⁶

The High Court in *Lyons* ultimately held that it is 'the actual investigation that requires the rights to cross-examination and representation, that takes prior to the initiation of the disciplinary procedure...'¹⁰⁵⁷ Mr Justice Eagar found that a refusal to allow legal representation to appear on behalf of the applicant and to allow the applicant to cross-examine the complainant through legal representation was in breach of Articles 40.3.1° and 40.3.2° of the Irish Constitution. Mr Justice Eagar stated that 'The Court is clear that in the circumstances where a complaint is made which could result in an individual's dismissal, or where it impinges on the individual's right to a good name, the individual is entitled to fair procedures, as outlined by the Supreme Court'.¹⁰⁵⁸ Prior to the *Lyons* decision, a right to legal representation at the disciplinary stage depended on the circumstances of each case.¹⁰⁵⁹

¹⁰⁵³ *Borges v Fitness to Practice Committee* [2004] 1 IR 103 (SC).

¹⁰⁵⁴ *ibid* 113.

¹⁰⁵⁵ *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272 [91].

¹⁰⁵⁶ *Borges v Fitness to Practice Committee* [2004] 1 IR 103 (SC) 119.

¹⁰⁵⁷ *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272 [96].

¹⁰⁵⁸ *ibid* [101].

¹⁰⁵⁹ The Code of Practice on Grievance and Disciplinary Procedures provides that an employee is entitled to be represented during the grievance and disciplinary procedure but does not require that this is legal representation and it does not exclude such representation. Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000, SI 2000/146 [4(6)]. The Supreme Court in *Burns v Governor of Castlereagh Prison* [2009] 3 IR 682 (SC) had held that a right to legal representation at a disciplinary hearing may be appropriate in certain circumstances. At paras 14 and 15 of that judgment, Mr

Now it appears, however, that there is a blanket right to legal representation at the investigation stage if the investigation is not just an evidence gathering exercise.¹⁰⁶⁰

Despite the right of an alleged wrongdoer to natural justice and fair procedures as outlined, these rights can be curtailed when balancing them against the rights of a discloser to have their identity protected. As demonstrated below in relation to data protection rights and obligations, the identity of the discloser does not have to be disclosed to the alleged wrongdoer in order for the alleged wrongdoer to be able to respond to the accusation. However, this issue becomes less clear when fair procedures and natural justice are considered. Meenan explains that the rights enunciated by Ó Dálaigh CJ in *Re Haughey* are normally applied as a package but that in some circumstances it may be appropriate that only some of the rights are applied.¹⁰⁶¹

Justice Geoghan approved the criteria set out by Mr Justice Webster in *R v Home Sec Ex p Tarrant* [1985] 1 QB 251 (HL), namely: (i) the seriousness of the charge and of the potential penalty; (ii) whether any points of law are likely to arise; (iii) the capacity of a particular prisoner to present his own case; (iv) procedural difficulty; (v) the need for reasonable speed in making the adjudication, that being an important consideration; and (vi) the need for fairness as between prisoners and as between prisoners and prison officers. Mr Justice Geoghan emphasised that the criteria suggested are starting off points to be considered and are merely factors which might be relevant in the consideration of whether legal representation is desirable in the interests of a fair hearing but that an employer would still be entitled to consider whether a fair hearing would require a lawyer in the particular circumstances of the case. Mr Justice Geoghan reiterated that legal representation should be the exception rather than the rule.

¹⁰⁶⁰ The Supreme Court in *Re National Irish Bank Ltd (under investigation) and Re Companies Act, 1990 (No. 1)* [1999] 3 IR 145 (SC) dealt with an investigation by inspectors which was a two stage one. The first stage of the investigation was an information gathering exercise by way of informal interviews, whilst the second stage of the investigation consisted of a hearing at which certain individuals could have legal representation, could cross-examine witnesses, and could give evidence themselves. The second stage of the investigation would only arise when the first stage indicated a possibility that adverse conclusions could be drawn in relation to those certain individuals. In distinguishing *Re Haughey* [1971] IR 217 (SC), Mr Justice Shanley at 168 held that at the first stage of the investigation, the inspectors cannot be compelled to produce any documents to the respondent and that the respondent is not entitled to any documents or to the facility of cross-examining any person at this initial stage in the process. Mr Justice Shanley stated that 'I am satisfied that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information gathering stage of the Inspectors' work. The procedures identified by the inspectors following the outcome of the first stage accord in my view with the requirements of fairness and justice and guarantee, where appropriate, the exercise of the rights identified in *In re Haughey* [1971] I.R. 217.'

¹⁰⁶¹ Frances Meenan, *Employment Law* (Round Hall 2014) 655-656. For example, if the alleged wrongdoer does not raise any issue of fact before their dismissal which needs to be referred to a tribunal then the *audi alteram partem* rule may not be applied. This position is demonstrated in the Supreme Court decision of *Mooney v An Post* [1998] 4 IR 288 (SC) where one of the arguments put forward by the plaintiff was that his dismissal breached fair procedures in circumstances where he was not afforded an investigation of the complaint against him at an oral hearing before an independent chairman. In dismissing the plaintiff's appeal, the Supreme Court noted that the plaintiff had been entitled to remain silent when the complaint against him had been the subject of criminal proceedings but that from the date of his acquittal until the date of his dismissal he had made no further statement in relation to the complaint made against him, although he had been afforded every opportunity to do so. In that regard, the Supreme Court held that as the plaintiff had raised no issue of fact there was no necessity to refer it to a civil tribunal. Barrington J stated that 'Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.' *ibid* 297.

5.4(e)(iii) *The balancing of rights of the discloser and the alleged wrongdoer*

Paragraph E(16) of the DPER Guidance provides that Procedures must comply with the general principles of natural justice and fair procedures, as appropriate.¹⁰⁶² The DPER Guidance acknowledges that this right to fair procedures may include the right of an alleged wrongdoer to challenge the evidence against them and in that regard, such a right will have to be balanced against the discloser's rights under the 2014 Act, in particular, the discloser's right to have their identity protected.¹⁰⁶³ For organisations, this must be a carefully calculated balancing exercise. Guidance as to how an organisation should proceed in such circumstances can be gleaned from the decision of the UK Employment Appeal Tribunal ('UKEAT') in *Linfood Cash & Carry Ltd v Thomson*.¹⁰⁶⁴ The UKEAT in this decision acknowledged that there must be a careful balance between 'the desirability to protect informants who are genuinely in fear, and providing a fair hearing of issues for employees who are accused of misconduct.'¹⁰⁶⁵ The UKEAT proceeded to lay down guidance as to the appropriate procedures to be deployed when the discloser wishes for their identity to remain protected and stated:

Every case must depend upon its own facts, and circumstances may vary widely — indeed with further experience other aspects may demonstrate themselves — but we hope that the following comments may prove to be of assistance:

1. The information given by the informant should be reduced into writing in one or more statements.¹⁰⁶⁶ Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.
2. In taking statements the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

¹⁰⁶² Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016) para E(16.1).

¹⁰⁶³ *ibid* para E(16.2).

¹⁰⁶⁴ *Linfood Cash & Carry Ltd v Thomson* [1989] ICR 518 (EAT) 522-523.

¹⁰⁶⁵ *ibid* 522.

¹⁰⁶⁶ When recording disclosures in writing this engages data protection law, which is discussed in the 'Data Protection' section below.

3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.
5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.
6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.
7. The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.
8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.
9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.
10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.¹⁰⁶⁷

Thus, in order to balance the rights of both the alleged wrongdoer and the discloser, the *Linfood* guidelines provide that the written recording of the disclosure should be furnished to the alleged wrongdoer but with the necessary omissions to avoid identification of the discloser.¹⁰⁶⁸ It further provides that management responsible for the hearing should interview the discloser and satisfy themselves as to the weight to be given to the information

¹⁰⁶⁷ *Linfood Cash & Carry Ltd v Thomson* [1989] ICR 518 (EAT) 522-523.

¹⁰⁶⁸ In the Irish EAT decision of *Kieran v Our Lady's Hospital for Sick Children* UDD 1129/1992 allegations regarding the disappearance of food from the hospital were made in confidence by members of staff to the Director of Nursing ('DON'). The DON did not reveal the identity of those staff members to the alleged wrongdoer, the claimant, on the grounds of fear of threats of intimidation. The claimant argued that he was dismissed unfairly for the alleged misconduct on the basis that the allegations about misappropriation of goods were not substantiated and no witnesses were called to give evidence and therefore the investigation was flawed. The EAT stated that it understood the position adopted by the DON that she could not divulge the name of the witnesses because they had approached her in confidence. The EAT held that the DON was not obliged to make such a disclosure as long as she outlined the allegations made by them to the claimant. The EAT further noted that the DON had five meetings with the claimant and therefore had every opportunity of responding to the allegations against him. On that basis, the EAT did not accept the claimant's submission that the dismissal was procedurally unfair.

and that any questioning of the discloser at a disciplinary hearing should be done through the chairperson of the disciplinary hearing.

Although welcome, the *Linfood* guidelines have limitations when the 2014 Act and other statutory obligations are taken into consideration. Firstly, the reference to the making of inquiries into the character and background of the informant is arguably inapplicable considering the explicit requirement under the 2014 Act that the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.¹⁰⁶⁹ Secondly, the *Linfood* guidelines provide that if the discloser is not prepared to attend a disciplinary hearing, and the employer is satisfied that the discloser has a genuine fear in attending, the employer must decide whether to continue with the disciplinary process. This approach may result in the discloser pursuing their disclosure outside of the organisation if they believe that the employer is not taking steps to address the alleged wrongdoing, which may result in reputational damage to the organisation. Also, the employer may have obligations under other statutory provisions to address wrongdoing in the workplace that must be complied with, ie s 8 of the Safety, Health and Welfare at Work Act 2005 obliges employers to ensure the safety, health, and welfare at work of their employees. Thus, if an employer fails to fully address a disclosure that the health and safety of an employee are being or is likely to be endangered, the employer could be found guilty of failing to discharge their duty to protect their employees. Further, an employer may have obligations under the common law or other statutory provisions. For example, in respect of health and safety concerns, under the common law negligence principles, an employer owes a duty of care to its employees ‘to take reasonable care for the servant’s safety in all the circumstances of the case.’¹⁰⁷⁰ It is also an implied term in an employee’s contract of employment that the employer will provide a safe and healthy working environment.¹⁰⁷¹

¹⁰⁶⁹ Protected Disclosures Act 2014, s 5(7). However, note that the motivation of a worker is a factor in relation to a disclosure of a trade secret as a result of the transposition of European Parliament and Council Directive 2016/943/EC of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1 into Irish law in June 2018 by the European Union (Protection of Trade Secrets) Regulations 2018, SI 2018/188, which inserts s 5(7A) into the 2014 Act and provides that ‘Where a worker, referred to in *subsection (1)*, makes a disclosure of relevant information in the manner specified by that subsection, and in respect of that disclosure of relevant information it is alleged that the disclosure concerned the unlawful acquisition, use, or disclosure of a trade secret (within the meaning of the European Union (Protection of Trade Secrets) Regulations 2018 (S.I. No. 188 of 2018)), disclosure is a protected disclosure provided that the worker has acted for the purposes of protecting the general public interest.’ Protected Disclosures Act 2014, s 5(7A).

¹⁰⁷⁰ *Dalton v Frendo* (SC, 15 December 1977) 4.

¹⁰⁷¹ *Wilson and Clyde Coal Co Ltd v English* [1938] AC 57 (HL).

In the Irish courts, there is precedent for arguing that the alleged wrongdoer may not always have the right to cross-examination at the disciplinary hearing. In the High Court decision of *Vogel v Cheeverstown House Ltd*,¹⁰⁷² Mr Justice Shanley held that the requirements of natural justice did not require a complainant to be produced and cross-examined by a disciplinary tribunal. This case concerned an application by the plaintiff for an interlocutory injunction restraining the defendant from commencing and determining a disciplinary charge against him in relation to an allegation of sexual abuse unless he was allowed to cross-examine the complainant. The complainant had a moderate level of mental handicap and was regarded as being ‘extremely sensitive, vulnerable, fragile mentally’¹⁰⁷³ and there was evidence following a validation exercise that being subjected to examination and cross-examination during the proposed tribunal would seriously damage her mental health. The defendant proposed to permit the plaintiff to use legal representation and to have copies of all correspondence, medical reports, and witness statements. The defendant intended that all witnesses would be produced, except for the complainant. However, all the evidence and the witnesses (including expert witnesses) that would appear at the tribunal would be giving hearsay evidence. In its judgment, the court considered the decision of *Keady v Commissioner of An Garda Síochána*¹⁰⁷⁴ and referred to the dicta of Mr Justice O’Flaherty where he stated:

[T]here is now in place a well charted system of administrative law which requires decision-makers to render justice in the cases brought before them and sets out the procedures that should be followed, which procedures will vary from case to case and from one type of tribunal to another and which, of course, are subject to judicial review. Similarly, the rules of evidence may not necessarily be applied with the same strictness as in a court of law provided that the decision-making body keeps in the forefront of its deliberations the necessity to come to a correct and just verdict having regard to the complaints that have to be investigated; the determination to be made and the consequences such determination may have for the other party or parties appearing before it.¹⁰⁷⁵

Taking this dicta into consideration, Mr Justice Shanley held that ‘in considering the question of the admissibility of hearsay evidence one must look at all of the facts and that the rights and, indeed, the interests of all of the parties must, as far as it is practicable to do so, be safeguarded.’¹⁰⁷⁶ Mr Justice Shanley was satisfied that the rules of natural justice do

¹⁰⁷² *Vogel v Cheeverstown House Ltd* [1998] 2 IR 496 (HC).

¹⁰⁷³ *ibid* 498.

¹⁰⁷⁴ *Keady v Commissioner of An Garda Síochána* [1992] 2 IR 197 (SC).

¹⁰⁷⁵ *Vogel v Cheeverstown House Ltd* [1998] 2 IR 496 (HC) 499.

¹⁰⁷⁶ *ibid* 500.

not require that the complainant be produced for examination and cross-examination by the proposed tribunal. Mr Justice Shanley balanced the evidence of risk of damage to the complainant's mental health and the risk of injustice to the plaintiff and held that the risk to the plaintiff could be avoided by ordering a further validation exercise to be performed by a nominated psychologist or psychiatrist by the plaintiff's representatives. Mr Justice Shanley emphasised that the requirements of natural justice depend on the circumstances of each case and the nature of each particular inquiry.¹⁰⁷⁷

Thus, an employer may be justified in refusing to produce a complainant at the disciplinary hearing if it can establish that it has balanced the risks to both the discloser and the alleged wrongdoer and that the risk of injustice to the alleged wrongdoer can be avoided by the taking of some other steps. The *Vogel* case concerned a complainant, which ties into the third issue of concern identified in the *Linfood* guidelines.

The *Linfood* guidelines apply to information received from informants who are not complainants and not to informants who are also complainants. An organisation may face a situation more complicated than that considered in the *Vogel* decision, where not only can the complainant not be produced and subject to cross-examination at the disciplinary hearing, but it may not be possible to disclose any basic details of the allegation against an alleged wrongdoer by the complainant in circumstances where in doing so this may reveal the identity of the discloser and subject them to serious risk of reprisal. This situation arose in the UKEAT decision of *Surrey CC v Henderson*,¹⁰⁷⁸ where the employer (the appellant) had received five statements from different individuals that an employee (the respondent) had threatened serious violence against each of them and members of their families. The basic details of the allegations were not furnished by the appellant to the respondent on the basis that it was necessary to protect the identities of the complainants. The complainants feared that they would be subject to reprisals by the respondent if their identities were made known and as a result, they would not attend an internal disciplinary hearing. The respondent was not furnished with any statements made by the complainants, even in redacted form.¹⁰⁷⁹

This was the first case in the UK to consider the fairness of disciplinary proceedings in circumstances where there was a refusal to provide the basic details of the allegations to the alleged wrongdoer. The UKEAT noted that the *Linfood* guidelines related to the protection

¹⁰⁷⁷ *ibid.*

¹⁰⁷⁸ *Surrey CC v Henderson* (UKEAT/0326/05/ZT, 23 November 2005).

¹⁰⁷⁹ *ibid* [9].

of informants who are not complainants and not informers who are also complainants.¹⁰⁸⁰ In this case, the UKEAT held that the ET had applied the incorrect test in determining that the dismissal was substantively unfair. The UKEAT held that in analysing whether the employer had reached a decision to dismiss the employee on reasonable grounds after a reasonable investigation, the ET had failed to assess whether the procedure adopted by the employer fell within or outside the band of reasonable responses.¹⁰⁸¹ The UKEAT explained that:

That band may include some reasonable employers who would have disclosed the witness statements taken from the five complainants, either in full or in redacted form, or in some other summary form and others who would not, given the promises of confidentiality made by the Respondents to those complainants based on their fears and concerns for themselves and their families.¹⁰⁸²

The UKEAT found that the ET had substituted their own view for that of a reasonable employer by finding that if the complaints were true then the claimant would know whom those complainants were, therefore rejecting the respondent's reason for not disclosing the statements of the complainants.¹⁰⁸³ The UKEAT provided guidance as to the correct approach in such circumstances stating that the ET was required:

[T]o make clear findings as to the extent of the Respondent's investigation into the reasons why the complainants insisted on anonymity and then to carry out the balancing act between the Respondent's perceived need to protect the identity of the complainants and the natural justice requirement that the Claimant should know sufficiently the nature of the case against him, applying the band of reasonable responses test.¹⁰⁸⁴

The proposition derived from this authority can be applied to disclosures made under the 2014 Act where the discloser is also a complainant, and they fear retaliation if their identity is revealed to the alleged wrongdoer. Therefore, in assessing whether an employer was reasonable in refusing to disclose the basic details of an allegation, including the identity of the complainant, to an alleged wrongdoer, requires the employer to undertake a reasonable investigation into the reasons why the complainant wishes for their identity to be protected. Also, if the sanction imposed at the end of a disciplinary process may be a dismissal, the employer must also satisfy the requirement that their action falls within the band of reasonable responses when balancing the rights of the complainant to protection of identity

¹⁰⁸⁰ *ibid* [21].

¹⁰⁸¹ *ibid* [29].

¹⁰⁸² *ibid*.

¹⁰⁸³ *ibid* [30].

¹⁰⁸⁴ *ibid* [31].

and the alleged wrongdoer's rights under natural justice to know the nature of the case against them sufficiently.

However, it may not always be possible for an employer to justify non-disclosure of the basic details of an allegation and it is likely that such a position could only be adopted if there is a real and serious risk of retaliation against the discloser. Therefore, an employer would be advised to conduct a risk assessment of a discloser's claim that they are at risk of penalisation. This could be similar to a risk assessment as required under the Safety, Health and Welfare at Work Act 2005 regarding hazards in the place of work.¹⁰⁸⁵ There are statutory requirements in Australia requiring organisations to assess risks of reprisals against disclosers.¹⁰⁸⁶ Prior to the introduction of the statutory risk assessment requirements under whistleblowing legislation in Australia, the WWTW study found that public sector organisations in Australia rarely used risk-management techniques for dealing with whistleblower retaliation.¹⁰⁸⁷ It further found from the interviews conducted for the WWTW study that there is a 'disturbing lack of interest in agencies in establishing procedures to assess risk and implementing structures to ensure that risk assessments actually take place.'¹⁰⁸⁸ The WWTW Guide acknowledges that undertaking a risk assessment of the likelihood of retaliation can be a quite difficult task for an organisation.¹⁰⁸⁹ In order to assist organisations in carrying out a risk assessment, the WWTW Guide contains an appendix with practical information for conducting a risk assessment that is based on lessons learnt from the research undertaken for the WWTW study.¹⁰⁹⁰

5.5 Data protection

5.5(a) Introduction

One glaring omission from the 2014 Act, the DPER Guidance, and the WRC Code of Practice is the matter of data protection. The draft EU Commission Directive on whistleblowing highlights the importance of data protection in the context of whistleblowing schemes and provides:

¹⁰⁸⁵ Safety, Health and Welfare at Work Act 2005, s 19.

¹⁰⁸⁶ Public Interest Disclosure Act 2012, s 33(2); Public Interest Disclosure Act 2013, s59(1)(a).

¹⁰⁸⁷ Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 60.

¹⁰⁸⁸ *ibid* 61.

¹⁰⁸⁹ *ibid* 62.

¹⁰⁹⁰ *ibid* app 2.

Protection of personal data of the reporting and concerned person is crucial in order to avoid unfair treatment or reputational damages due to disclosure of personal data, in particular data revealing the identity of a person concerned. Hence, in line with the requirements of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ... competent authorities should establish adequate data protection procedures specifically geared to the protection of the reporting person, the concerned person and any third person referred to in the report that should include a secure system within the competent authority with restricted access rights for authorised staff only.¹⁰⁹¹

This position enunciated by the European Commission is contained in art 18 of the draft EU Commission Directive on whistleblowing and requires that any processing of personal data pursuant to that Directive be made in accordance with GDPR and Directive 2016/680.¹⁰⁹²

Organisations must be accountable, meaning that they must respect their data protection obligations and must demonstrate that they respect those obligations. The EDPS asserts that the best way for an organisation to ensure that it is accountable is for it to consider the data protection implications at the design stage of a whistleblowing scheme.¹⁰⁹³ The issue of data protection applies not only to the alleged wrongdoer's rights but also to the rights of witnesses, third parties¹⁰⁹⁴ and the discloser's rights, however, the Data Protection Working Party stresses that the implementation of whistleblowing schemes run a grave risk of stigmatisation and victimisation of the alleged wrongdoer in the organisation where they work.¹⁰⁹⁵ The Data Protection Working Party emphasise that 'The person will be exposed to such risks even before the person is aware that he/she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated. The Data Protection Working Party is of the view that proper application of data protection rules to whistleblowing schemes will contribute to alleviate the above-mentioned risks.'¹⁰⁹⁶

¹⁰⁹¹ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) Recital 58.

¹⁰⁹² *ibid* art 18.

¹⁰⁹³ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 11. The EDPS recommends that the organisation's data protection officer be engaged early in the process of designing a whistleblowing scheme.

¹⁰⁹⁴ The European Data Protection Supervisor explains that the mere fact that a name of an individual is mentioned in a document does not result in all the information in that document becoming 'data relating to that person'. *ibid* 7. In those circumstances, that individual need not necessarily be notified of the report, especially as it may involve a disproportionate effort and therefore a decision to inform third parties should be made on a case-by-case basis. *ibid* 8.

¹⁰⁹⁵ This view is echoed by the EDPS. *ibid* 5.

¹⁰⁹⁶ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 7. Opinion

Therefore, there should be a serious consideration of these rules in the context of a whistleblowing scheme, in both its development and implementation. Due to the serious risk to the alleged wrongdoer in this regard, as highlighted by the Data Protection Working Party, the focus of this research is on the rights of the alleged wrongdoer in the context of data protection rules under a whistleblowing scheme.

The issue of the interaction between protected disclosures and data protection was raised by a number of public sector bodies in the DPER Statutory Review.¹⁰⁹⁷ For example, the Department of Defence highlighted in its submission that:

In order for the Minister to fully investigate the discloser complaints, on occasion, it is necessary to access all the information held on the subject matter of the complaints on the Department files, this has not always been possible because to access this type of information requires the data subject to be informed that his or her data is being accessed for the purposes of carrying out an investigation under the Protected Disclosures Act. Depending on the nature of the complaints, the investigator may not wish to reveal the identity of the discloser or indeed, even at the screening stage when the protector disclosure officer is analysing the complaints to ascertain if it is a protected disclosure, the requirement to adhere to the data protection legislation can prove problematic. In particular circumstances, it may make it impossible to complete the assessment or investigation.¹⁰⁹⁸

The International Bar Association Working Group emphasise that organisations must be aware of their obligations under both whistleblowing laws and data protection laws when developing their frameworks for whistleblower protection.¹⁰⁹⁹ It further encourages legislators to have regard to data protection laws when drafting or amending whistleblowing law to ensure that ‘compliance with one law does not inadvertently result in the contravention of another law.’¹¹⁰⁰ The 2014 Act lags behind other jurisdictions in its failure to include this issue.¹¹⁰¹ As such, in operating a whistleblowing scheme, it is currently left

1/2006 may have wider application that to the fields mentioned and may apply where the processing of personal data is involved. Jeremy Lewis and others, *Whistleblowing Law and Practice* (3rd edn, OUP 2017) para 19.109.

¹⁰⁹⁷ The Data Protection Commission; the Department of Defence; the Department of Education and Skills; and the Garda Síochána Ombudsman Commission. Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

¹⁰⁹⁸ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

¹⁰⁹⁹ International Bar Association-Legal Policy & Research Unit and Legal Practice Division, ‘Whistleblower Protections: A Guide’ (IBA April 2018) 25.

¹¹⁰⁰ *ibid.*

¹¹⁰¹ The issue of data protection is included in the following whistleblowing legislation: (i) Bolivia: Law 458 for Whistleblower and Witness Protection 2013, art 2; (ii) Czech Republic: Banks Act No 21/1992 Coll, Savings and Credit Cooperatives Act No 87/1995 Coll, Capital Market Undertakings Act (Financial Acts) No 256/2004 Coll; (iii) Ecuador: Criminal Code 1971, art 495; (iv) Hungary: Complaints and Announcements of

to the organisation itself to identify its obligations under the 2014 Act and data protection rules, to identify where the obligations under both laws conflict, and to determine the best way of resolving this conflict.

5.5(b) Protections for data subjects

An individual has the right to privacy as an unenumerated right under the Irish Constitution.¹¹⁰² This right was first acknowledged in the Supreme Court decision of *McGee v A-G*¹¹⁰³ where Mr Justice Walsh held that ‘Article 41 of the Constitution guarantees the husband and wife against any... invasion of their privacy by the State.’¹¹⁰⁴ The right to privacy was first enforced in the High Court case of *Kennedy and Arnold v A-G*¹¹⁰⁵ where Hamilton P stated that although it was ‘not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flows from the Christian and democratic nature of the State.’ The case law of the Irish courts demonstrates that this is not an absolute right and it must be balanced with other rights.¹¹⁰⁶

This right to privacy is also an explicit right under art 8 of the European Convention of Human Rights (‘ECHR’).¹¹⁰⁷ The right to privacy under art 8 ECHR is more than just a

Public Concern Act (the ‘Whistleblower Act’) 165 of 2013; (v) Italy: Legislative Decree 2015/72, s 18; Legislative Decree 1993/285, s 52-bis; (vi) Kosovo: Draft Law on Protection of Whistleblowers 2018, art 12; and (vii) Serbia: Law on the Protection of Whistleblowers Act, no 2014/128, art 10.

¹¹⁰² The right to privacy is not a specific right under the Irish Constitution but is embedded in a number of different articles, including the Preamble, which refers to the respect for human dignity and freedom of the individual. The right to privacy can be found in the following articles: privacy of the ballot (art 16.1.4°); litigation privacy (art 34); personal autonomy (arts 40.3.1° and 40.3.2°); limited freedom from arrest and detention (art 40.4°); the inviolability of the dwelling (art 40.5°); the rights of citizens to express freely their convictions and opinions, to assemble peaceably and without arms, and to form associations and unions (art 40.6.1°); protection of family life (art 41); the rights of the family with regard to education (art 42); the right of private property (art 43); freedom of conscience and the free profession and practice of religion (art 44.2.1°). In relation to these articles, Mr Justice McCarthy in *Norris v A-G* [1984] IR 36 (SC) 100, explained that ‘All these may properly be described as different facets of the right of privacy, but they are general in nature (as necessarily they must be in a Constitution) and do not set bounds to the enumeration of the details of such a right of privacy when the occasion arises.’

¹¹⁰³ *McGee v A-G* [1974] IR 284 (SC).

¹¹⁰⁴ *ibid* 313.

¹¹⁰⁵ *Kennedy and Arnold v Ireland and A-G* [1987] IR 587 (HC).

¹¹⁰⁶ *Doe v The Revenue Commissioners* [2008] IEHC 5; *Kennedy and Arnold v Ireland and A-G* [1987] IR 587 (HC); *Bailey v Flood* [2000] IESC 11; *Haughey v Moriarty* [1999] 3 IR 1 (SC); *Redmond v Flood* [1999] 3 IR 79 (SC); *A-G v Open Door Counselling* [1988] IR 593 (SC); *People (DPP) v McCann* [1998] 4 IR 397 (CCA); *X v Flynn* (HC, 19 May 1994); *Maguire v Drury* [1994] 2 IR 241 (SC); *National Irish Bank v RTÉ* [1998] 2 IR 465 (SC); *HSE v A* [2011] 3 IR 22 (HC); *Marine Terminals v Loughman* [2009] IEHC 620.

¹¹⁰⁷ Article 8 ECHR provides, ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ European Convention on Human Rights and Fundamental Freedoms 4 November 1950, 213 UNTS221 (ECHR) art 8.

straightforward right to privacy and has been held by the European Court of Human Rights ('ECtHR') to be a broad concept.¹¹⁰⁸ It goes further than just a right to privacy and relates to a right to respect for one's private and family life. This right is not an absolute, however, and art 8(2) ECHR provides that it may be limited in certain circumstances.¹¹⁰⁹

The right to privacy is also addressed by art 7 of the EU Charter of Fundamental Rights¹¹¹⁰ ('EU Charter') which provides that 'Everyone has the right to respect for his or her private and family life, home and communication.'¹¹¹¹ This right is also a broad concept and is not only a right to privacy but also a right to respect for one's private and family life. The GDPR makes specific reference to private life and provides that:

This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.¹¹¹²

This right is entitled 'Right to respect for private and family life' and as noted by Mr Justice Feeney in *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] 4 IR 309, 316 'Article 8 does not protect private or family life as such ... it guarantees a 'respect for these rights'. In view of the diversity of circumstances and practices in the contracting States, the notion of 'respect' (and its requirements) are not clear-cut; they vary considerably from case to case.'

¹¹⁰⁸ *A, B and C v Ireland* [2010] ECHR 2032.

¹¹⁰⁹ It is for the individual to establish that the State has interfered with their right. The State must then show that the action is justified in accordance with law. Thus, the interference must have a basis in domestic law and be accessible and foreseeable. If the interference is in accordance with the law, the ECtHR must then be satisfied that the interference is necessary in a democratic society in the interests of one of the exceptions contained in art 8(2) ECHR. If the interference is not in accordance with the law, then the court is prevented from reviewing the legitimacy of the aim pursued by that interference, see: *Rotaru v Romania* [2000] ECHR 192 [62].

¹¹¹⁰ The Charter of Fundamental Rights of the European Union [2016] was designed to reaffirm existing rights deriving from the case law of the CJEU and the ECtHR, as well as constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union, and by the Council of Europe. It was not intended to create new rights. The EU Commission explained that the purpose of the Charter is that it 'complements existing systems for the protection of fundamental rights, it does not replace them ... The provisions of the Charter are addressed to the Member States only when they are implementing EU law and neither the Charter nor the Treaty creates any new competence for the EU in the field of fundamental rights. Where ... national legislation ... does not constitute a measure implementing EU law or is not connected in any other way with EU law, the jurisdiction of the Court is not established.' Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights, Brussels, 8.5.2013, COM(2013) 271 final, 6-7.

¹¹¹¹ *ibid* art 7. Although the Charter provides for rights and freedoms that are intended to be the same as those provided for by the ECHR, the ECtHR in Strasbourg and the CJEU in Luxembourg may apply them differently. It is worth noting that the decisions of the ECtHR are not directly enforceable against Member States, whilst the decisions of the CJEU are directly enforceable.

¹¹¹² Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], Recital 4. This can be contrasted with the predecessor to the GDPR, the Council Directive (EC) 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, which specifically referenced the right to privacy in Recital 2 stating that the design of data processing systems 'must, whatever

The application of art 8 ECHR in the context of data protection applies to personal data contained in correspondence, personal data stored in a person's home, personal data stored by others outside the home, and to photographs taken by third parties.¹¹¹³ The failure to keep accurate personal data has been held by the ECtHR to constitute a breach of art 8 ECHR.¹¹¹⁴ Further, the ECtHR in *Nikolova v Bulgaria*¹¹¹⁵ emphasised that 'the gathering, storing and release of information relating to an individual's "private life" come within Article 8 of the Convention.'¹¹¹⁶ A failure to secure an individual's personal data may be a breach of art 8 ECHR,¹¹¹⁷ as well as a failure to destroy personal data.¹¹¹⁸

The protection of natural persons in relation to the processing of personal data¹¹¹⁹ is a fundamental right, as provided for in both the EU Charter and the Treaty on the Functioning of the European Union.¹¹²⁰ The EU Charter stipulates that EU citizens have the right to protection of their personal data and provides that:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.¹¹²¹

the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy.' Directive 95/46/EC also referred to the right to privacy in Recitals 6 and 10.

¹¹¹³ Denis Kelleher, *Privacy and Data Protection Law in Ireland* (2nd edn, Bloomsbury Professional 2015) para 3.15.

¹¹¹⁴ *Babylonova v Slovakia* [2006] ECHR 630.

¹¹¹⁵ *Nikolova v Bulgaria* [2013] ECHR 1291.

¹¹¹⁶ *ibid* [105].

¹¹¹⁷ *I v Finland* [2008] ECHR 623.

¹¹¹⁸ *Reklos and Davourlis v Greece* [2009] ECHR 200.

¹¹¹⁹ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 4(1) defines 'personal data' as 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.' The EDPS maintains that personal data not only includes identification data, as contained in art 4(1), but also information that relates to the behaviour of an individual. Therefore, a recording of the whistleblower's disclosure is also personal information of the whistleblower since it relates to their behaviour. European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 6.

¹¹²⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, art 16(1).

¹¹²¹ Charter of Fundamental Rights of the European Union [2016], art 8.

This right to data protection under the EU Charter is not absolute, however, and may be limited in certain circumstances as long as any limitation complies with the requirements of art 52(1) of the EU Charter.

Data protection rules must be interpreted in a manner that is compatible with the right to privacy¹¹²² and the right to protection of personal data. The fundamental principles for processing personal data are set out in art 5 of the GDPR and require that data be:

- (i) Processed lawfully, fairly, and transparently.
- (ii) Collected for specified, explicit, and legitimate purposes.
- (iii) Adequate, relevant, and limited to what is necessary.
- (iv) Accurate and up-to-date.
- (v) Kept in a form which permits identification for no longer than necessary.
- (vi) Processed in a manner to ensure appropriate security of the data.¹¹²³

The Data Protection Working Party stresses that there must be compliance with EU data protection rules when implementing whistleblowing schemes.¹¹²⁴ With the introduction of the GDPR on 25 May 2018, organisations must have regard to these rules when establishing and implementing their whistleblowing schemes. Many of the provisions in the GDPR are not new, however, and obligations for organisations relating to whistleblowing schemes already existed under Directive 95/46EC.¹¹²⁵ In Ireland, the GDPR was transposed into Irish law under the Data Protection Act 2018. The issue of data protection can be a problematic area for organisations when trying to balance the rights and interests of the organisation and

¹¹²² The ECHR became a part of Ireland's domestic law in 2003 with the commencement of the European Convention on Human Rights Act 2003. European Convention on Human Rights Act 2003, s 2(1), provides that when 'interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.'

¹¹²³ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art (5)(1)(a)-(f).

¹¹²⁴ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 6. Opinion 1/2006 relates to Directive 95/46EC but could arguably apply to the equivalent provisions under the GDPR until there is an updated Opinion from the European Data Protection Board.

¹¹²⁵ Council Directive (EC) 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

the discloser and the rights and interests of the alleged wrongdoer. The Data Protection Working Party highlights this tension between the operation of whistleblowing schemes and data protection obligations to an alleged wrongdoer,¹¹²⁶ which will be discussed below.

5.5(c) *Lawfulness of data processing*

When implementing its whistleblowing scheme, an organisation must consider its compatibility with data protection rules. The first issue to be considered is the lawfulness of the processing¹¹²⁷ of the personal data. Article 6 of the GDPR provides that processing of data will only be lawful if at least one of six grounds contained therein apply. These grounds are as follows:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.¹¹²⁸

For the purposes of processing personal data under a whistleblowing scheme, it may be lawful under two grounds, art 6(1)(c) and art 6(1)(f) of the GDPR.

¹¹²⁶ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 7.

¹¹²⁷ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 4(2) defines ‘processing’ as ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.’

¹¹²⁸ *ibid* art 6(1)(a)-(f).

5.5(c)(i) *Compliance with a legal obligation*

Article 6(1)(c) of the GDPR provides that the processing of personal data obtained may be lawful if it is necessary for compliance with a legal obligation to which the controller is subject.¹¹²⁹ Commenting on the previous equivalent provision, art 7(c) in Directive 95/46/EC, the Data Protection Working Party explained that ‘The establishment of a reporting system should have the purpose of meeting a legal obligation imposed by Community or Member State law, and more specifically a legal obligation designed to establish internal control procedures in well-defined areas.’¹¹³⁰ This position adopted by the Data Protection Working Party is now enshrined in the GDPR by the inclusion in art 6(3) which provides that if data is processed under art 6(1)(c) of the GDPR the basis for the processing must be laid down under EU law or Member State law to which the controller is subject. For public bodies, this can be satisfied due to their legal obligations under s 21(1) of the 2014 Act to establish and maintain Procedures. For other organisations not subject to s 21(1) there may be national and EU sectoral legislative provisions that require a strengthening of internal controls thereby meeting the legal obligation requirement. For example, the UK Corporate Governance Code, which applies to Irish incorporated listed companies on the Main Securities Market (‘MSM’) of the Irish Stock Exchange, requires the Board of Directors of these companies to maintain internal control systems.¹¹³¹ Also, the Capital Requirements Directive, Directive 2013/36/EU, obliges competent authorities¹¹³² to require credit institutions and investment firms to have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures in order to identify, measure, monitor, and control transactions with their parent mixed-activity holding company and its subsidiaries appropriately.¹¹³³ Further, under the Companies Act 2014, the board of directors of a ‘large’¹¹³⁴ company must establish an audit

¹¹²⁹ *ibid* art 14(1)(c).

¹¹³⁰ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 7.

¹¹³¹ Financial Reporting Council, ‘The UK Corporate Governance Code’ (FRC April 2016) s C.

¹¹³² Council Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012 [2012], art 4(1)(40), defines ‘competent authority’ as ‘a public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned.’

¹¹³³ Council Directive (EC) 2013/36 of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC OJ L176/338, art 123(2).

¹¹³⁴ Companies Act 2014, s 167(1).

committee¹¹³⁵ (or explain in the directors' report why they are not establishing such a committee)¹¹³⁶ who are required to monitor the effectiveness of the company's systems of internal control, internal audit, and risk management.¹¹³⁷

In addition, art 4(1) of the draft EU Commission Directive on whistleblowing obliges Member States to ensure that all legal entities in the private¹¹³⁸ and public sectors establish internal channels and Procedures for reporting and following up on reports.¹¹³⁹ If this proposal under the draft Directive is adopted, then such legal entities in the private sector will also be able to rely on art 6(1)(c) of the GDPR to justify the processing of personal data under a whistleblowing scheme.

As mentioned above, the Data Protection Working Party in their Opinion 1/2006 had interpreted art 7(c) of Directive 95/46/EC narrowly, finding that an obligation imposed on organisations by a non-EU legal statute or regulation to establish a whistleblowing scheme may not qualify as a legal obligation on the basis that to allow this would facilitate the circumvention of EU rules contained in Directive 95/46/EC. Therefore, the whistleblowing obligations under SOX on the EU affiliates of publicly held US companies and non-US companies listed in one of the US stock markets could not be justified under art 7(c) of the GDPR.¹¹⁴⁰ As this position adopted by the Data Protection Working Party is now streamlined in the GDPR by the inclusion in art 6(3) that the basis for the processing of data under art 6(1)(c) of the GDPR must be laid down under EU law or Member State law to which the controller is subject, this guarantees that such obligations will not be a valid reason for the processing of personal data.

5.5(c)(ii) *Legitimate interests test*

¹¹³⁵ *ibid* s 167(2).

¹¹³⁶ *ibid* s 167(3).

¹¹³⁷ *ibid* s 167(7)(b).

¹¹³⁸ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 4(3) provides that this requirement will apply to the following legal entities in the private sector: 'a) private legal entities with 50 or more employees; b) private legal entities with an annual business turnover or annual balance sheet total of EUR 10 million or more; c) private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing, as regulated under the Union acts referred to in the Annex.'

¹¹³⁹ *ibid* art 4(1).

¹¹⁴⁰ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 8.

Where an organisation cannot justify the processing of personal data under art 6(1)(c) of the GDPR, it may rely on the ground in art 6(1)(f) of the GDPR.¹¹⁴¹

The Data Protection Working Party Opinion 06/2014 stated that a 'legitimate interest' must 'be lawful (i.e. in accordance with applicable EU and national law); - be sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (i.e. sufficiently specific); - represent a real and present interest (i.e. not be speculative).'¹¹⁴² Data processing under this ground must be done in the least intrusive manner possible.¹¹⁴³ Arguably, whistleblowing schemes pursue legitimate interests, for example, the identification of wrongdoing or ensuring the adequate functioning of organisations. However, the key concern for organisations is ensuring that there is a balance between the legitimate interests pursued by the controller or the third party and the interests or fundamental rights and freedoms of the data subject. The Data Protection Working Party advises in its Opinion 1/2006 that this balance of interest test should 'take into account issues of proportionality, subsidiarity, the seriousness of the alleged offences that can be notified and the consequences for the data subjects. In the context of the balance of interest test, adequate safeguards¹¹⁴⁴ will also have to be put in place.'¹¹⁴⁵ The Data Protection Working Party in its Opinion 06/2014 addresses some of the key factors that should be considered when applying the balancing test, namely:

(i) The nature and source of the legitimate interests of the controller.¹¹⁴⁶

(ii) The impact on the data subjects.¹¹⁴⁷

¹¹⁴¹ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 6(1)(f).

¹¹⁴² Article 29 Data Protection Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under art 7 of Directive 95/46/EC [2006] 844/14/EN WP 217, 25.

¹¹⁴³ Article 29 Data Protection Working Party Opinion 2/2017 of 8 June 2017 on data processing at work [2017] 17/EN WP 249.

¹¹⁴⁴ Article 29 Data Protection Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under art 7 of Directive 95/46/EC [2006] 844/14/EN WP 217, 31, provides that 'Safeguards may include, among others, strict limitations on how much data are collected, immediate deletion of data after use, technical and organisational measures to ensure functional separation, appropriate use of anonymisation techniques, aggregation of data, and privacy-enhancing technologies but also increased transparency, accountability, and the possibility to opt-out of the processing.'

¹¹⁴⁵ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 9.

¹¹⁴⁶ Article 29 Data Protection Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under art 7 of Directive 95/46/EC [2006] 844/14/EN WP 217, 34-36.

¹¹⁴⁷ *ibid* 36-41.

(iii) Additional safeguards applied by the controller.¹¹⁴⁸

Therefore, organisations that cannot rely on a specific legal requirement justifying the implementation of a whistleblowing scheme can rely on art 6(1)(f) of the GDPR, as long as the organisation: (i) carries out an assessment of its interests as being legitimate; (ii) determines that the processing is necessary to achieve the interest pursued; (iii) establishes a provisional balance by assessing that the data controller's interest overrides the fundamental rights or interests of the data subjects; and (iv) establishes a final balance by taking into account additional safeguards. This must all be done in a manner that demonstrates compliance and ensures transparency.¹¹⁴⁹ Organisations should prepare a background document analysing this 'legitimate interest' test before relying on it to justify the processing of an alleged wrongdoer's data.

It appears that public bodies will not be able to avail of this ground in art 6(1)(f) of the GDPR on the basis of the provision that states 'Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.'¹¹⁵⁰ Nonetheless, as public bodies are required under s 21 of the 2014 Act to establish and maintain Procedures, they can avail of the ground in art 6(1)(c) of the GDPR, compliance with a legal obligation.

5.5(d) Information to be provided by data controller to data subject when data has not been obtained from data subject

When an organisation decides to process personal data of a data subject on one of the grounds contained in art 6 of the GDPR, there are certain further considerations for the organisation. Article 14 GDPR addresses the information that should be provided by the data controller to the data subject when the data has not been obtained from the data subject. For example, the data subject should be provided with information relating to the identity and contact details of the controller;¹¹⁵¹ the contact details of the data protection officer, where applicable;¹¹⁵² the intended purposes of and legal basis for the processing of the personal data;¹¹⁵³ the

¹¹⁴⁸ *ibid* 41-43.

¹¹⁴⁹ *ibid* annex 1.

¹¹⁵⁰ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 6(1)(c).

¹¹⁵¹ *ibid* art 14(1)(a).

¹¹⁵² *ibid* art 14(1)(b).

¹¹⁵³ *ibid* art 14(1)(c).

categories of personal data concerned;¹¹⁵⁴ the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;¹¹⁵⁵ the existence of the right to request from the data controller access to and rectification or erasure of personal data or restriction of processing and to object to processing concerning the data subject;¹¹⁵⁶ and from which source the personal data originated.¹¹⁵⁷ Article 14(3) of the GDPR sets out the timeframe within which information must be provided to the data subject, stipulating that the information must be provided:

- (a) within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed.
- (b) if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or
- (c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.¹¹⁵⁸

5.5(e) *Limitations on data subjects rights*

Article 23 of the GDPR provides grounds for restriction of the data subject's obligations and rights under art 5 of the GDPR (insofar as its provisions correspond to the rights and obligations provided for in arts 12 to 22), arts 12 to 22, and art 34 of the GDPR by way of a legislative measure. Section 60 of the Data Protection Act 2018 ('2018 Act') purports to be a legislative measure provided for under art 23 of the GDPR that restricts the data subject's obligations and rights and sets out the grounds for the restrictions. In order for a legislative measure that restricts data subjects' rights to be lawful, it must comply with art 52(1) of the EU Charter, which provides that:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.¹¹⁵⁹

Thus, in order to be lawful, any limitation on the right to protection of personal data and the right to privacy must fulfil the following criteria:

¹¹⁵⁴ *ibid* art 14(1)(d).

¹¹⁵⁵ *ibid* art 14(2)(a).

¹¹⁵⁶ *ibid* art 14(2)(c).

¹¹⁵⁷ *ibid* art 14(2)(f).

¹¹⁵⁸ *ibid* art 14(3)(a)-(c).

¹¹⁵⁹ Charter of Fundamental Rights of the European Union [2016], art 52(1).

- (i) It must be provided for by law.
- (ii) It must respect the essence of the rights and freedoms under the EU Charter.
- (iii) It must genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.
- (iv) It must be necessary.
- (v) It must be proportional.¹¹⁶⁰

Thus, the restrictions provided for in s 60 of the 2018 Act that limit a data subject's rights to protection of personal data and privacy must comply with the criteria set down in art 52(1) of the EU Charter. In the context of a whistleblowing scheme, s 60(3)(b) of the 2018 Act is a relevant restriction on a data subjects rights.¹¹⁶¹ Section 60(3)(b) provides that the rights and obligations of the data subject can be restricted to the extent that 'the personal data relating to the data subject consist of an expression of opinion about the data subject by another person given in confidence or on the understanding that it will be treated as confidential to a person who has a legitimate interest in receiving the information.'¹¹⁶² The explanatory memorandum to the Data Protection Bill 2018 provides that this provision is 'important in the context of protected disclosures and other whistleblowing activity.'¹¹⁶³

5.5(f) *Application of restrictions in the context of a whistleblowing scheme*

A number of the grounds in art 23 of the GDPR could be relied upon for the introduction of the s 60 restrictions.¹¹⁶⁴ Further, a number of the restrictions in s 60 of the 2018 Act could be relied upon in the context of a whistleblowing scheme, such as, to safeguard national security, defence and the international relations of the State,¹¹⁶⁵ for the prevention, detection,

¹¹⁶⁰ European Data Protection Supervisor, 'Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit' (EDPS 11 April 2017) 4.

¹¹⁶¹ There are additional subsections that may be relied upon. However, for the purposes of this analysis, s 60(3)(b) of the 2018 Act was deemed to be the most appropriate provision to subject to the necessity test.

¹¹⁶² Data Protection Act 2018, s 60(3)(b).

¹¹⁶³ Explanatory Memorandum to the Data Protection Bill 2018 (Data Protection Act 2018) 11.

¹¹⁶⁴ For example: to safeguard national security, defence and public security; to safeguard the prevention, investigation, detection, or prosecution of criminal offences; to safeguard other important objectives of general public interest of the EU or of a Member State; to safeguard a monitoring, inspection, or regulatory function connected, even occasionally, to the exercise of official authority in the aforementioned grounds; to safeguard the protection of the rights and freedoms of others; and to safeguard the enforcement of civil law claims. Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 23(1)(a)-(j).

¹¹⁶⁵ Data Protection Act 2018, s 60(3)(a)(i).

investigation and prosecution of criminal offences,¹¹⁶⁶ in contemplation of prospective legal proceedings,¹¹⁶⁷ and for the enforcement of civil law claims.¹¹⁶⁸

A particularly strong ground for restricting a data subject's rights in the context of a whistleblowing scheme can be found in s 60(3)(b), as discussed above. Section 60(3)(b) aims to restrict the rights of the data subject to protection of personal data and to privacy on the ground provided for in art 23 of the GDPR that it is a necessary and proportionate measure to safeguard the rights and freedoms of others.¹¹⁶⁹ The rights and freedoms of others that would be safeguarded in such an instance would be the discloser's right to have their identity protected under s 16 of the 2014 Act and their right to freedom of expression under the Irish Constitution¹¹⁷⁰ and art 10 ECHR. In restricting the data subject's rights as intended under s 60, there is a requirement that the 'essence' of those rights must be respected. This means that the right to protection of personal data and the right to privacy must not be emptied of their basic content and the data subject must still be able to exercise those rights. Thus, s 60(3)(b) of the 2018 Act could be relied upon by an organisation to refuse to reveal the identity of the worker who discloses information about another person. It must be noted, that the Data Protection Working Party is fervent in its position that the identity of a discloser should not be made known to the alleged wrongdoer, stating 'Under no circumstances can the person accused in a whistleblower's report obtain information about the identity of the whistleblower from the scheme on the basis of the alleged wrongdoer's right of access, except where the whistleblower maliciously makes a false statement. Otherwise, the whistleblower's confidentiality should always be guaranteed.'¹¹⁷¹ The EDPS is just as staunch in this position and argues that:

When access is granted to the personal information of any concerned individual, the personal information of third parties such as informants, whistleblowers or witnesses should be removed from the documents except in exceptional circumstances if the whistleblower authorises such a disclosure, if this is required by any subsequent

¹¹⁶⁶ *ibid* s 60(3)(a)(ii).

¹¹⁶⁷ *ibid* s 60(3)(a)(iv).

¹¹⁶⁸ *ibid* s 60(3)(a)(v).

¹¹⁶⁹ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 23(1)(i).

¹¹⁷⁰ Art 40.6.1°.

¹¹⁷¹ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 14.

criminal law proceedings or if the whistleblower maliciously makes a false statement. If a risk remains of third party identification, access should be deferred.¹¹⁷²

5.5(g) Delay of notification to data subject

The Data Protection Working Party in Opinion 1/2006 instructs that where there is a substantial risk that the investigation of the alleged wrongdoing or the gathering of evidence would be jeopardised if the data subject is notified of the information contained in art 14 of the GDPR, then notification can be delayed for as long as that risk exists. The risk must be assessed in light of the possibility of evidence being destroyed or altered by the alleged wrongdoer. In applying this exception, organisations must do so restrictively and on a case-by-case basis, taking into account the wider interests at issue.¹¹⁷³ The EDPS also adopts this position of deferral of information if the provision of information to the data subject would be detrimental to the case. The EDPS advises that each decision must be taken on a case-by-case basis, and importantly, any decision taken to defer the notification must be documented.¹¹⁷⁴

Where information is received that on a preliminary screening is not credible, Lewis suggests that a common sense approach is adopted and advises against automatic notification as no defence needs to be furnished by the data subject and that notification to such an individual may cause unnecessary stress.¹¹⁷⁵ Further, it is arguable that conveying such allegations to an employee without undertaking a preliminary screening would be a breach of an employer's duty of confidence and trust.¹¹⁷⁶ Lewis recommends that an organisation should include in its whistleblowing arrangements an explicit statement that a data subject will only

¹¹⁷² European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 8.

¹¹⁷³ Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 13.

¹¹⁷⁴ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 7.

¹¹⁷⁵ David Lewis, 'Whistleblowing and data protection principles: Is the road to reconciliation really that rocky?' (2011) 2(1) European Journal of Law and Technology 3 <<http://ejlt.org/article/view/53/119>> accessed 1 April 2019.

¹¹⁷⁶ For example, see: *Gogay v Hertfordshire CC* [2000] IRLR 703, where a letter from a local authority (the employer) to a residential care worker (the employee) informing her that she was being suspended while allegations of sexual abuse by a young person in the care home were being investigated was found to be clearly calculated to seriously damage the relationship between them and that, in this case, there was no reasonable or proper cause to do this.

be notified of a false allegation if there is a reason to believe that the allegations were made maliciously.¹¹⁷⁷

5.5(h) *Maliciously false statements*

If a worker makes a maliciously false disclosure, they cannot avail of the protections of the 2014 Act, including the protection of identity under s 16. A worker who makes a protected disclosure as per the requirements of the 2014 Act is immune from civil liability.¹¹⁷⁸ However, this immunity from civil liability excludes a cause of action in defamation.¹¹⁷⁹ Nonetheless, if a worker who makes a protected disclosure is alleged to have defamed a third party, a worker will have a defence of ‘qualified privilege’ in such circumstances.¹¹⁸⁰ This means that unless the discloser is motivated by malice in the making of a false disclosure, they will not be liable for any damage suffered by the alleged wrongdoer. This is provided for in s 19(1) of the Defamation Act 2009 which states ‘In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice.’ Thus, the person who is the subject of the disclosure would have to show that the dominant factor operating in the mind of the discloser at the time was the improper motive.¹¹⁸¹ The draft EU Commission Directive on whistleblowing proposes that Member States must provide for penalties applicable to persons who make malicious or abusive reports or disclosures as well as providing for measures for compensating persons who suffer from such reports or disclosures.¹¹⁸²

Therefore, the discloser’s identity may need to be revealed in order to allow the person who was the subject of an alleged maliciously false statement to pursue a claim in defamation. This would deprive the worker of the protection of identity before it is determined that they did not make a protected disclosure, which would engage the s 16 of the 2014 Act

¹¹⁷⁷ David Lewis, ‘Whistleblowing and data protection principles: Is the road to reconciliation really that rocky?’ (2011) 2(1) European Journal of Law and Technology 6 <<http://ejlt.org/article/view/53/119>> accessed 1 April 2019.

¹¹⁷⁸ Protected Disclosures Act 2014, s 14.

¹¹⁷⁹ *ibid* s 14(1).

¹¹⁸⁰ *ibid* s 14(2) inserts s 13A into the Defamation Act 2009, pt 1 of Sch 1. This can be contrasted with the position in the UK where PIDA is silent on the issue of defamation. For more discussion on the position in the UK, see: David Lewis, ‘Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?’ (2017) 47(3) Industrial Law Journal 339.

¹¹⁸¹ Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) 1331.

¹¹⁸² Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 17(2).

protections. In that regard, the organisation could rely on the exception in s 16(2)(d) of the 2014 Act that it is necessary in the public interest or it is required by law to disclose the worker's identity. It is in the public interest that maliciously false disclosures are deterred and that wronged individuals are entitled to defend themselves from injury to their reputation in the eyes of reasonable members of society. However, this position justifying disclosure of the worker's identity when there is an allegation of a maliciously false statement must be considered in line with the position adopted by the EDPS. The EDPS has advised that if a worker makes a maliciously false statement the personal data of the worker can only be disclosed to judicial authorities¹¹⁸³ and those judicial authorities must be competent in actions relating to maliciously false statements.¹¹⁸⁴

It is recommended that organisations include in their Procedures that it is a disciplinary offence to make a maliciously false disclosure and that their identity may be disclosed to judicial authorities in such circumstances.

5.6 Conclusion

Committing to protecting the identity of a worker has been recognised as the most effective way of encouraging potential disclosers to come forward with information of wrongdoing,¹¹⁸⁵ as well as being the cornerstone of whistleblower protection.¹¹⁸⁶ However, in respecting this right to protection of identity and respecting the essence of whistleblowing and whistleblowing law, organisations must task themselves with respecting the rights of alleged wrongdoers simultaneously. The proposal at EU level for the imposition of penalties on organisations that fail to protect a discloser's identity¹¹⁸⁷ means that organisations must be extremely cautious in their approach to respecting the rights of alleged wrongdoers for fear that they may open themselves up to serious ramifications for failing to protect the rights of a discloser. As the law currently stands in Ireland, an individual may be personally liable if they breach a worker's right to protection of identity.¹¹⁸⁸ The research undertaken for this

¹¹⁸³ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 5.

¹¹⁸⁴ European Data Protection Supervisor, 'Letter to the European Ombudsman, Case 2010-0458' (EDPS 30 July 2010).

¹¹⁸⁵ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 1.

¹¹⁸⁶ Explanatory Memorandum to the Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) 11.

¹¹⁸⁷ Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD) art 17.

¹¹⁸⁸ Protected Disclosures Act 2014, s 16(3).

chapter was intended to assist organisations in carrying out this delicate exercise of balancing rights when dealing with disclosures under their Procedures, whilst respecting the purpose of the 2014 Act.

The explanatory memorandum to the Council of Europe's Recommendation (2014)7 on the Protection of Whistleblowers acknowledges that the principle of confidentiality can conflict with the rules of fairness and provides:

The principle also recognises that protecting the identity of the whistleblower can occasionally conflict with the rules of fairness (for example, fair trial and the common-law notion of natural justice). Where it is impossible to proceed – for example, to take action against a wrongdoer or those responsible for the damage caused without relying directly on the evidence of the whistleblower and revealing his or her identity – the consent and co-operation of the whistleblower should be sought, and any concern that he or she might have about their own position addressed. In some cases it may be necessary to seek a judicial ruling on whether and to what extent the identity of the whistleblower can be revealed.¹¹⁸⁹

The submission by the Houses of the Oireachtas Service to the DPER Statutory Review demonstrates the conflict experienced by organisations when balancing the rights of the discloser with the rights of the alleged wrongdoer. It stated that:

The issue of the rights of employees who are the subject of an accusation are not dealt with in the context of the current Act. In light of the recent judicial pronouncements in cases such as *Lyons v Longford* and *Westmeath Education and Training Board* [2017] IEHC 272 these rights should be considered. This is particularly so in the context of the statutory position of anonymity for the person making the disclosure (section 16). It may be these issues should be addressed in procedures implemented rather than in any legislative provision but it should be noted that those rights can be a critical challenge for an organisation dealing with a disclosure made pursuant to the Act.¹¹⁹⁰

The difficulty experienced by organisations is also underscored by the answers to the prescribed persons' survey regarding the steps taken by them to protect the worker's identity.

¹¹⁸⁹ Explanatory Memorandum to the Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers' Deputies (SPDP Council of Europe 2014) para 71.

¹¹⁹⁰ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018. Further the Policing Authority argued in its submission to the DPER Statutory Review that 'The protections contained in the 2014 Act for individuals who make a disclosure need to be balanced with some provisions that address the protection for persons who are the subject of allegations by a discloser availing of the protections of the 2014 Act.' The issue was also highlighted by the Department of Education and Skills; the HSE; Resolve; and Transparency International Ireland. Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

The answers highlighted that there are varying approaches being adopted by organisations to protecting a discloser's identity, thus calling attention to the problem for organisations in dealing with the issue of protecting the worker's identity in isolation. However, when these survey responses are coupled with the fact that the overall compliance rate of Procedures with the DPER Guidance on the issue of the rights of the alleged wrongdoer was only 29%, there is evidence of a significant level of uncertainty experienced by organisations regarding their obligations of the issue of protection of identity and protection of rights of the alleged wrongdoer.

As discussed in this chapter, a worker is entitled to have their identity protected under both the 2014 Act¹¹⁹¹ and under data protection principles.¹¹⁹² On the other hand, an alleged wrongdoer is entitled under natural justice, and fair procedures to cross-examine the discloser who is also their accuser¹¹⁹³ and to know the source of the allegations or complaint and/or be allowed to confront or question witnesses,¹¹⁹⁴ which may include the discloser. The alleged wrongdoer is entitled to these rights where a concern is made which could impinge on an individual's good name or reputation, as protected under Article 40.3.2° of the Irish Constitution,¹¹⁹⁵ or which could jeopardise any of their personal rights,¹¹⁹⁶ and where it could result in a dismissal.¹¹⁹⁷ Since the *Lyons* decision, an alleged wrongdoer is entitled to these rights at the investigation stage if an investigation into the disclosure extends further than simply investigating the allegations and deciding whether there is a case to answer or not.¹¹⁹⁸ Further, under data protection rules, the alleged wrongdoer has a right to privacy¹¹⁹⁹ and a right to data protection.¹²⁰⁰ These rights require that personal data be processed in accordance with the fundamental principles contained in art 5 GDPR and the processing of the data must be lawful under at least one of the grounds contained in art 6

¹¹⁹¹ Protected Disclosures Act 2014, s 16(1).

¹¹⁹² European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 4-5, 8; Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 14.

¹¹⁹³ *Re Haughey* [1971] IR 217 (SC) 263.

¹¹⁹⁴ Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000, SI 2000/146 [4(6)].

¹¹⁹⁵ *Borges v Fitness to Practice Committee* [2004] 1 IR 103 (SC) 113.

¹¹⁹⁶ *Re Haughey* [1971] IR 217 (SC) 264.

¹¹⁹⁷ *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272 [95].

¹¹⁹⁸ *ibid* [96]-[101].

¹¹⁹⁹ An unenumerated right under the Irish Constitution; under the ECHR; and under the Charter.

¹²⁰⁰ Charter of Fundamental Rights of the European Union [2016], art 8; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, art 16(1).

GDPR. When a disclosure is made to an organisation, and personal data of the alleged wrongdoer is recorded, the alleged wrongdoer is entitled to know from which source the personal data originated.¹²⁰¹

The rights afforded to both the discloser and the alleged wrongdoer are not absolute, however, and may be curtailed when balancing them against one another. With regard to the right of the discloser to have their identity protected, considering the statutory provisions, it is clear that this right under s 16 of the 2014 Act is not absolute.¹²⁰² If an investigation is more than just an information gathering exercise but makes findings of fact, then the identity of the worker may need to be disclosed to allow the alleged wrongdoer to cross-examine them at that stage. In those circumstances, the employer can argue that it reasonably believed that it was necessary to disclose the worker's identity for the effective investigation of the relevant wrongdoing alleged by the worker.¹²⁰³ Further, a court may make an order for the disclosure of the identity of a worker, for example, where an 'involved' third party who is 'mixed up' in the wrongdoing is under a duty to assist a claimant who has been wronged by giving him full information and disclosing the identity of the wrongdoers.¹²⁰⁴ In such circumstances, an employer could also rely on the exception in s 16(2)(d) of the 2014 Act that it is necessary to reveal the discloser's identity as it is required by law. The employer could also rely on the defence in s 16(2)(d) that it is required by law to disclose the worker's identity in order to comply with the principles of natural justice and fair procedures as derived from the Irish Constitution, statute, contract law, and case law.

An organisation may also be entitled to curtail the alleged wrongdoer's rights to natural justice and fair procedures, and refuse to disclose the worker's identity to the alleged wrongdoer. The case law addressing this issue of balancing the rights of a discloser and an

¹²⁰¹ Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 14(2)(f).

¹²⁰² Protected Disclosures Act 2014, s 16(2).

¹²⁰³ *ibid* s 16(2)(c)(i).

¹²⁰⁴ *Norwich Pharmacal Co v Commissioners of Custom and Excise* [1974] AC 133 (HL) 503-04. This decision was referred to by the Irish Supreme Court in *Megaleasing UK Ltd, Megaleasing Holdings Ltd and Quantum Data SA v Barrett* [1992] 1 IR 219 (SC) where Finlay CJ averred 'I conclude from these speeches that the granting of an order for discovery in an action of sole discovery prior to the institution of proceedings against any defendant is a power which for good reasons must be sparingly used, though, where appropriate it may be of very considerable value towards the attainment of justice. What does seem clear is that in the *Norwich Pharmacal* case considerable stress was laid upon the very clear and unambiguous establishment of a wrongdoing. Similar considerations apply to the case of *Orr v Diaper*, where the issue arose on a demurrer and was, therefore, based on an assumption of the establishment of the wrong.' Thus, the Supreme Court in the *Megaleasing* case unequivocally lays down the principle that the jurisdiction of the court to grant relief in an action for discovery only arises where there is very clear proof of the existence of wrongdoing.

alleged wrongdoer demonstrates that the protection of identity of the discloser, be they an informant who is not a complainant or an informer who is also a complainant, is robust.¹²⁰⁵

Firstly, if the alleged wrongdoer does not raise any issue of fact before their dismissal that needs to be referred to a tribunal, then the *audi alteram partem* rule may not be applied.¹²⁰⁶

Secondly, as demonstrated from the case law, there may be other means by which an organisation can proceed with an investigation or disciplinary hearing. If the discloser is unwilling to permit their identity to be disclosed to the alleged wrongdoer, an organisation may omit information that could lead to the revelation of the discloser's identity in the written recording of the disclosure furnished to the alleged wrongdoer.¹²⁰⁷ Also, a chairperson of a disciplinary hearing can adjourn a hearing to make further inquiries of the discloser if any particular and relevant issue, which should be put to the discloser, is raised during the hearing.¹²⁰⁸ Further, an organisation can refuse to produce the discloser for cross-examination at the disciplinary hearing if it can establish that it has balanced the risks to both the discloser and the alleged wrongdoer and that the risk of injustice to the alleged wrongdoer can be avoided by the taking of some other steps.¹²⁰⁹

Thirdly, if a discloser is also a complainant, and they may be subject to a serious risk of reprisal, then the organisation may refuse to disclose any basic details of the disclosure to the alleged wrongdoer.¹²¹⁰ In order to stand over such a decision, the organisation must undertake a reasonable investigation into the reasons why the complainant wishes for their identity to be protected. It must also demonstrate that their action falls within the band of reasonable responses when balancing the rights of both parties if there is a risk of dismissal of the alleged wrongdoer.¹²¹¹ It is advisable that organisations carry out a risk assessment in order to validate that there was a real and serious risk of retaliation against the discloser.

¹²⁰⁵ Note also the decision of the UKEAT in *Ramsey v Walkers Snack Foods Ltd* [2004] ALL ER (D) 237 (Feb) (EAT) where the *Linfood* guidelines were departed from and the anonymity of the disclosers was preserved in circumstances where there were compelling reasons to do so, ie encouraging workers of a factory in a close-knit community to come forward with information relating to theft in the workplace in circumstances where the workers were genuinely in fear and would therefore only speak to one member of management. The preservation of anonymity meant that their statements were edited sufficiently to remove any identifying features of the discloser and neither the decision maker nor the investigation officer knew the identity of the disclosers and were unable to directly test their evidence.

¹²⁰⁶ *Mooney v An Post* [1998] 4 IR 288 (SC).

¹²⁰⁷ *Linfood Cash & Carry Ltd v Thomson* [1989] ICR 518 (EAT) 522-523.

¹²⁰⁸ *ibid* 522-523.

¹²⁰⁹ *Vogel v Cheeverstown House Ltd* [1998] 2 IR 496 (HC).

¹²¹⁰ *Surrey CC v Henderson* (UKEAT/0326/05/ZT, 23 November 2005).

¹²¹¹ *ibid* [30].

Moreover, an organisation can refuse to reveal the identity of the worker under data protection rules. It has been highlighted by the Data Protection Working Group that the identity of the worker must be protected in order to comply with the security of processing operations under art 32 of the GDPR.¹²¹² Further, the alleged wrongdoer's rights under art 14 of the GDPR, including their right to know from which source the personal data originated, are not absolute and can be restricted under art 23 of the GDPR.¹²¹³ Therefore, an organisation could rely on the restrictions contained in s 60 of the 2018 Act, the legislative measure provided for under art 23 of the GDPR, to justify its actions. In addition to a number of potential grounds for restriction contained in s 60(3) of the 2018 Act that may apply to a particular type of situation,¹²¹⁴ an organisation could substantiate the restriction of the alleged wrongdoer's rights under data protection law on the ground in s 60(3)(b), which provides that the personal data disclosed consisted of an expression of an opinion that was given in confidence or on the understanding that it would be treated as confidential by the recipient, who has a legitimate interest in receiving the disclosure. However, under data protection rules, if a disclosure is suspected of being maliciously false, then the identity of the worker can be disclosed to the appropriate judicial authorities.

5.6(a) *Practical steps for organisations*

As can be seen from the research presented in this chapter, an organisation will have to consider a range of issues when balancing the rights of each party to a disclosure and this must be done on a case-by-case basis in respect of the particular facts. Nonetheless, in doing so, it is recommended that organisations approach the issue from the perspective of the purpose of the 2014 Act, which is to protect workers who make a protected disclosure. Therefore, it is advisable that an organisation should attempt to prioritise the protection of

¹²¹² Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 14.

¹²¹³ To safeguard national security, Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 23(1)(a); to safeguard defence, *ibid* art 23(1)(b); to safeguard public security, *ibid* art 23(1)(c); to safeguard the prevention, investigation, detection or prosecution of criminal offences, *ibid* art 23(1)(d); to safeguard other important objectives of general public interest of the Union or of a Member State, *ibid* art 23(1)(e); to safeguard a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the aforementioned grounds, *ibid* art 23(1)(h); to safeguard the protection of the rights and freedoms of others, *ibid* art 23(1)(i); to safeguard the enforcement of civil law claims, *ibid* art 23(1)(j).

¹²¹⁴ To safeguard national security, defence and the international relations of the State, Data Protection Act 2018, s 60(3)(a)(i); for the prevention, detection, investigation and prosecution of criminal offences, *ibid* s 60(3)(a)(ii); in contemplation of prospective legal proceedings, *ibid* s 60(3)(a)(iv); for the enforcement of civil law claims, *ibid* s 60(3)(a)(v).

the worker's identity over the rights of the alleged wrongdoer when the opportunity presents and it does not breach the latter's constitutional rights. It is recommended that in order to achieve this, organisations take the following practical steps:

(i) An organisation may wish to make its disciplinary rules and the protected disclosures procedures part of the employee's contract of employment. The benefit of this practice can be seen from the High Court decision of *Stoskus v Goode Concrete Ltd*¹²¹⁵ where the plaintiff was seeking a declaration that the procedures adopted by the defendants that led to his dismissal were in breach of the rules of natural justice and fair procedures. The plaintiff herein had signed a written contract of employment, which incorporated the disciplinary procedure to be applied in the event of any alleged misconduct arising. Ms Justice Irvine noted that:

The plaintiff seems to have signed his contract of employment with the defendants on 7th June, 2004 and committed himself by its express terms to abide by this disciplinary procedure as part of his contract. *Prima facie* his rights in relation to the conduct of a disciplinary hearing should be a matter of private law and defined by the contract between the parties.

The plaintiff had argued that he had been entitled to legal representation at his disciplinary hearing. His contract of employment allowed him to be accompanied by a fellow employee. The plaintiff had not argued before the court that this clause did not meet the standards advised in the Code of Practice on Grievance and Disciplinary Procedures,¹²¹⁶ which provides that 'the employee concerned is given the opportunity to avail of the right to be represented during the procedure.'¹²¹⁷ The court noted that the Code of Practice on Grievance and Disciplinary Procedures does not provide that this right to be represented includes a right to legal representation.¹²¹⁸ The court held that:

In this respect the plaintiff's assertion that he was not afforded natural justice and fair procedures by reasons of the absence of a right to legal representation places his

¹²¹⁵ *Stoskus v Goode Concrete Ltd* [2007] IEHC 432.

¹²¹⁶ Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000, SI 2000/146.

¹²¹⁷ *ibid* [4(6)].

¹²¹⁸ Note, however, that the Supreme Court in *Burns v Governor of Castlereagh Prison* [2009] 3 IR 682 (SC) has held that a right to legal representation at a disciplinary hearing may be appropriate in certain circumstances (discussed above at footnote 1059). Thus, it is important to note that just because a code of practice or contract does not allow legal representation at an internal hearing, a discretionary decision can be made in exceptional circumstances, which would be determined by taking the six criterion into consideration. This right to legal representation, however, has now been extended to investigations under the *Lyons* decision. Nonetheless, it is arguable the criteria approved in the Supreme Court would still have applicability, where appropriate, in assisting an employer in its decision whether to afford such a right at the investigation stage.

demands for natural justice at a higher threshold than that provided for in the code of practice contained in S.I. No. 146/2000.

If the Plaintiff had not signed a contract of employment or had signed a contract of employment which was silent as to the disciplinary procedure to be followed in a case of alleged misconduct, then the plaintiff might be in a stronger position to contend that the rules of natural justice and fair procedures should be implied into the agreement ...¹²¹⁹

However, organisations should be cautious in adopting this approach as any changes to the Procedures cannot be made unilaterally and the employer is bound to follow the Procedures also. Therefore, if this approach is adopted, an organisation would be advised to ensure that their Procedures comply with the 2014 Act, any relevant codes of practice, and the DPER Guidance.

(ii) Since the decision of the High Court in the *Lyons* case, which introduced a right to cross-examine witnesses through legal representation at the investigation stage, an employer would be advised to ensure that the investigation into the disclosure that is carried out does not make final binding findings of fact and is strictly a fact-finding or information gathering exercise, and leaves final binding findings of fact to the disciplinary stage of the procedure. This would assist an employer in its efforts to protect the identity of the discloser.

(iii) A way for organisations to circumvent having to respect the rights and interests of the data subject and the associated difficulties with same under a whistleblowing scheme at the initial stages of the process would be to avoid recording personal data on receipt of a disclosure. The Office of the Data Protection Commissioner has submitted that this position should be adopted as a legislative measure, stating that:

[A]ny legislative amendment made to the 2014 Act should make it clear that the default position is that a worker making a protected disclosure should highlight a wrongdoing rather [than] make an accusation against a person and that as a starting point the processing of third party personal data should be avoided. The processing, (in other words obtaining, storing, using, disclosing etc) of personal data of third parties should not impinge on the data protection rights of others;

[T]he personal data of third parties should only be processed by a worker making a protected disclosure where the use of such personal data is absolutely necessary to

¹²¹⁹ It should be noted that the *Stoskus* case was an application for an interlocutory injunction and required that the plaintiff establish a strong case to support his application. The court noted that the plaintiff may have an arguable case but not a good arguable case or a strong one and that the plaintiff's claim was no more than merely stateable.

make the protected disclosure; in other words, it would not otherwise be possible for the worker to make the protected disclosure without processing the personal data.¹²²⁰

(iv) The tension regarding respecting the alleged wrongdoer's rights under data protection rules could also be avoided by not making an electronic or manual record of a report, but this may cause difficulties for an investigation or information could become muddled, lost, or misunderstood, thus diluting the effectiveness of a whistleblowing scheme. Another approach would be for an organisation to subject the personal data to pseudonymisation. This involves the replacing of any identifying characteristics of data with a pseudonym, which is essentially a value that ensures that the data subject is not directly identifiable.¹²²¹ The GDPR defines 'pseudonymisation' as:

[T]he processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person.¹²²²

The GDPR at recital 28 explains that 'The application of pseudonymisation to personal data can reduce the risks to the data subjects concerned and help controllers and processors to meet their data-protection obligations. The explicit introduction of 'pseudonymisation' in this Regulation is not intended to preclude any other measures of data protection.'¹²²³ However, pseudonymisation of personal data, which could be attributed to a natural person by the use of additional information, is still considered to be information on an identifiable natural person and therefore, principles of personal data still apply.¹²²⁴ The benefit of such an approach, however, is that it may be feasible to protect the identity of the discloser when referring the disclosure to the data subject and for protecting their identity during any assessment or investigation of the disclosure. Further, it allows for different records that relate to the same person to be linked without storing direct identifiers in the data.¹²²⁵

¹²²⁰ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (*DPER*) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

¹²²¹ Data Protection Commissioner, 'Anonymisation and pseudonymisation' (*Data Protection Commissioner*) <www.dataprotection.ie/docs/Anonymisation-and-pseudonymisation/1594.htm> accessed 8 April 2018.

¹²²² Council Regulation (EC) 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], art 4(5).

¹²²³ *ibid* Recital 28.

¹²²⁴ *ibid* Recital 26.

¹²²⁵ Data Protection Commissioner, 'Anonymisation and pseudonymisation' (*Data Protection Commissioner*) <www.dataprotection.ie/docs/Anonymisation-and-pseudonymisation/1594.htm> accessed 8 April 2018.

(v) The EDPS is of the opinion that the placing of a data protection statement on the organisation's website or within a public or internal facing document is not sufficient. It recommends instead that a specific data protection statement should be directly provided to all individuals (ie whistleblowers, alleged wrongdoers, witnesses, and third parties) affected by the organisation's whistleblowing scheme as soon as reasonably practicable.¹²²⁶

(vi) With respect to anonymous disclosures and the risks associated with same for alleged wrongdoers, it is recommended that organisations commit to receiving anonymous disclosures, but that appropriate safeguards are established to protect the alleged wrongdoer. In that regard, it is recommended that Procedures explain that it is a disciplinary offence to make maliciously false disclosures and that disclosers will be subject to disciplinary action (if their identity is subsequently revealed). It is also essential that recipients of disclosures be trained to identify when there is a risk to an alleged wrongdoer who is the subject of an anonymous disclosure. Further, if there is no risk to the investigation being jeopardised and the recipient of the disclosure believes that there is merit to the disclosure, the alleged wrongdoer should be furnished with a written record of it as soon as is reasonably possible and given an opportunity to respond.

5.6(b) Recommendations for statutory and non-statutory changes

There are a number of statutory and non-statutory changes that should be adopted in order to assist organisations with their obligations regarding the rights of the discloser and the alleged wrongdoer. The Department of Education and Skills submitted to the DPER Statutory Review that 'It may be necessary to amend or make provisions in the Protected Disclosures Act 2014 in light of the General Data Protection Regulation (GDPR) and the associated Data Protection Bill 2017.'¹²²⁷ This proposal to deal with the interplay between the 2014 Act and data protection through a statutory amendment was echoed by GSOC in their submission to the DPER Statutory Review. GSOC suggested that there should be a balancing test included in legislation to balance potential competing rights under the various statutory regimes.¹²²⁸ These submissions were responded to by DPER in its Statutory

¹²²⁶ European Data Protection Supervisor, 'Guidelines on processing personal information within a whistleblowing procedure' (EDPS July 2016) 7.

¹²²⁷ Department of Public Expenditure and Reform, 'Public Consultation on the Review of the Protected Disclosures Act 2014' (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

¹²²⁸ *ibid.*

Review, which confirmed that ‘It is proposed to make a statutory instrument if necessary to ensure data protection law and protected disclosures law can continue to work in tandem.’¹²²⁹

DPER’s response is welcome, however, it is a conditional commitment, stating that a statutory instrument will be developed ‘if necessary’. The purpose of this research was to: (i) provide guidance to organisations as to what rules to apply when attempting to protect the rights of both parties; (ii) highlight where conflict may arise; and (iii) when a conflict arises, provide advice as to best practice to adopt when one party’s rights take precedence over another party’s rights. The research undertaken establishes that the interplay between the rights of the discloser and the alleged wrongdoer is multifaceted and specific guidance is necessary for an organisation to assist them in balancing the rights of both parties. It is arguable that the current DPER Guidance, the WRC Code of Practice, and the Code of Practice on Grievance and Disciplinary Procedures are inadequate to address the organisation’s obligations regarding the rights of the discloser and the alleged wrongdoer in the context of protected disclosures.

It is recommended that a code of practice that deals specifically with investigation and disciplinary procedures, as well as the issue of data protection, in the context of a protected disclosure, be developed that addresses the following:

- (i) The rights that apply to the alleged wrongdoer in the context of a protected disclosure process.
- (ii) How to balance the rights of the alleged wrongdoer and the discloser under natural justice and fair procedures.
- (iii) The application of data protection rules in the context of a protected disclosure process.
- (iv) When and how the identity of the discloser be protected and what are the limitations to this protection.
- (v) How to deal with anonymous disclosures.

It is also recommended that training for recipients of disclosures is designed to ensure they are familiar with what is meant by natural justice and fair procedures and to recognise when

¹²²⁹ Department of Public Expenditure and Reform, ‘Statutory Review of the Protected Disclosures Act 2014’ (DPER July 2018) 44.

these rights should be afforded to the alleged wrongdoer, as well as how to balance those rights with the right to protection of the identity of the discloser.¹²³⁰ There should also be training on the interaction between data protection rules and protected disclosures.

In its submission to the DPER Statutory Review, the Office of the Data Protection Commissioner suggested that it should be expressly stated in an amendment to the 2014 Act that the Data Protection Commissioner ‘is not precluded from investigating an alleged contravention of the Data Protection Acts 1988 and 2003 simply because the alleged contravention occurred in the context of, or in connection with, the making of a protected disclosure.’¹²³¹ Such an inclusion in the 2014 Act would heighten an organisation’s awareness that they must comply with data protection rules when processing personal data under a whistleblowing scheme.

Finally, s 21(2) of the 2014 Act, which requires all public bodies to provide written information in relation to their Procedures to workers employed by it, should be amended to reflect the EDPS position that a specific data protection statement should be directly provided to all individuals affected by the organisation’s whistleblowing scheme. Arguably, this should apply to all organisations, and not just those in the public sector.

The research undertaken for this chapter highlights that the purpose of the 2014 Act to protect workers who make protected disclosures is at risk of not being achieved due to the conflict for organisations when endeavouring to respect the rights of both the discloser and the alleged wrongdoer. Therefore, the recommendations outlined in this chapter are intended to support organisations in their obligations when dealing with protected disclosures in order to ensure that the purpose of the 2014 Act is not undermined.

¹²³⁰ Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 66.

¹²³¹ Department of Public Expenditure and Reform, ‘Public Consultation on the Review of the Protected Disclosures Act 2014’ (DPER) <www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/> accessed 6 November 2018.

Chapter 6: Conclusion

6.1 Introduction

The 2014 Act was drafted in light of a recognition that society needs whistleblowers to uncover wrongdoing and whistleblowers need protection, including protection of their right to freedom of expression, in order to be encouraged to come forward with information about wrongdoing. The legislation was also drafted against a backdrop of a long history of negative attitudes and perceptions of informers, spies, and traitors as a result of 800 years of oppression by Britain, which was often assisted by natives. The 2014 Act was designed to remedy the deficiencies associated with the original sectoral approach to whistleblower protection. The objective of the legislation is set out in its preamble and provides that it is ‘An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.’ The central question that was explored in this thesis was, is the 2014 Act fulfilling its purpose of providing protection to disclosers, as set out in its preamble? In order to answer this central research question, a number of ancillary questions were asked, including: (i) What can we learn about how the 2014 Act is operating from an analysis of the case law under the 2014 Act? (ii) Is the prescribed persons’ system established under the 2014 act operating effectively? (iii) How can organisations balance their obligations to respect the rights of both the discloser and the alleged wrongdoer when implementing Procedures? The research undertaken for this thesis has identified that the purpose of the 2014 Act is not being attained.

6.2 Summary and evaluation

Currently, the statutory regime and its non-statutory complementary framework are failing to provide adequate protection to workers who make a disclosure of relevant information that in their reasonable belief tends to show one or more relevant wrongdoings, and which came to their attention in connection with their employment. There are a number of reasons for this failure.

Notably, when a claim under the 2014 Act is initiated, this means that the deterrent effect of the legislation for employers against the taking of reprisal against a worker has not been achieved. Although there have only been forty-eight decisions under the 2014 Act, this does not account for the number of claims that have settled. Of course, it is impossible to know how many workers have made protected disclosures and have not had to avail of the

remedies under the 2014 Act. Such information would assist in determining the success or otherwise of the proactive protection provisions of the 2014 Act. However, despite the limitation on the assessment of the success rate of the proactive protection provisions of the 2014 Act, the evidence that there have been claims under the 2014 Act demonstrates that there has been some reprisal against workers for making disclosures, and it has been recognised that irrespective of the rates of reprisal, any reprisal is considered too much.

The case law research indicates a high level of unsuccessful cases. There are a number of procedural issues arising as a result of the way in which the 2014 Act has been drafted, and this means that certain workers who are entitled to a remedy under the 2014 Act are not being afforded it. These reasons include: the six-month time limit for the initiation of claims before the Workplace Relations Commission, as well as the treatment of penalisation as occurring on the date that it commenced, as opposed to the date when it ceased; the limitation on the ability to file both an unfair dismissal and a penalisation claim; the cap on compensation; the method by which penalisation awards are calculated and the types of damages that can be awarded; the approach adopted in the 2014 Act to address personal grievances; and the lack of training for Labour Court members and adequate training for Adjudication Officers resulting in a misinterpretation and misapplication of the law. In order to remedy these deficiencies, the statutory provisions of the 2014 Act, including the procedural rules under the Workplace Relations Act 2015, need to be amended. Further, specialised and intensive training for decision makers is paramount to ensure that workers who are entitled to remedies under the 2014 Act are not deprived of their rights.

The 2014 Act is designed to encourage internal reporting, and this appears to be succeeding as can be seen from the case law analysis and the results of the IAW survey. However, although this is the intention underpinning the 2014 Act, the fact that so few disclosures have been made to prescribed persons cannot be explained simply on the basis that the intention of the 2014 Act for the making of internal disclosures is being met. Prescribed persons are not making information regarding their role publicly available, as well as failing to publish their annual reports, and this means that workers are not aware that disclosures can be made to them and not aware of the responses that prescribed persons are taking in relation to protected disclosures. It appears that organisations were designated as prescribed persons, but there was no guidance provided to them or oversight of the system. Further, the finding that a number of prescribed persons no longer exist and that some appropriate regulatory bodies have been omitted from the prescribed persons' statutory instrument, as well as the

limitation on the remit of certain prescribed persons, means that workers have one less channel through which they can make their disclosure. These anomalies increase the worker's risk of suffering retaliation and reduce their chances of availing of the protection provisions under the 2014 Act for making a disclosure under s 7. The prescribed persons' statutory instrument needs to be amended and kept up-to-date. Further, there should be a statutory obligation imposed on prescribed persons' to make information about their role publicly available. The suggestion of an oversight authority for prescribed persons should assist prescribed persons in their role, meaning that more wrongdoing will be disclosed and importantly, the risk of retaliation is reduced for a worker who faces such a risk if they make their disclosure to their employer.

For those prescribed persons that have published Procedures, there is evidence that they are not complying with their obligation to have regard to the DPER Guidance. The DPER Guidance is intended to supplement the statutory protection regime for workers, but unfortunately, it appears not to be appropriate for the needs of prescribed persons. The DPER Guidance further appears to be causing apprehension for prescribed persons with regard to how to provide internal organisational protection to workers who do not fall under the ambit of the 2014 Act and for workers who disclose an employment specific/profession specific breach that does not constitute a relevant wrongdoing under the 2014 Act. In order to achieve the purpose of the 2014 Act, all workers, irrespective of their employment relationship and irrespective of the nature of the wrongdoing that they raise, should be protected. Specific guidance for prescribed persons is necessitated, in respect of both their Procedures and their annual reports, as well as tailored protected disclosures training, in order to ensure that workers are protected when availing of this disclosure channel under the 2014 Act.

The DPER Guidance is also inadequate for addressing the needs of an organisation when establishing and maintaining their Procedures in relation to balancing the rights of the discloser and the alleged wrongdoer. The purpose of the 2014 Act is to provide protection to workers, but when these protections are balanced against the rights of the discloser, organisations are unclear as to which takes precedence and when, which ultimately dilutes the purpose of the 2014 Act. In order to support the purpose of the 2014 Act, the issues of protection of identity, anonymous disclosures, data protection, and natural justice and fair procedures need to be addressed in the 2014 Act and the DPER Guidance. Further, a code of practice that deals specifically with investigation and disciplinary procedures, as well as

data protection, in the context of a protected disclosure, needs to be developed in line with the purpose of the 2014 Act in order to assist organisations.

In order to remedy the weaknesses of the protected disclosures protection system in Ireland, the following recommendations for statutory and non-statutory reform are made:

Table 6.1 Recommendations for statutory and non-statutory reform

No	Current position	Recommendation
1	Complainants must file their penalisation claim within six months of the date of the alleged contravention.	The Workplace Relations Act 2015 should be amended to reflect: (i) s 48(3)(a) of the UK Employment Rights Act 1996 which provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure; and (ii) 48(4)(a) of the 1996 Act which provides that ‘where an act extends over a period, the ‘date of the act’ means the last day of that period.’
2	An award of compensation for unfair dismissal or penalisation is capped at five years’ gross remuneration.	Section 11(1)(d) and Sch 2(3)(a) of the 2014 Act should be amended to the effect that there is no cap on the amount of compensation that can be awarded in an unfair dismissal or penalisation claim.
3	There is no guidance as to how damages are calculated by the WRC in a penalisation claim.	1. The 2014 Act should be amended to reflect: (i) s 49(2) of the UK Employment Rights Act 1996 which provides that compensation awarded must be such as the tribunal considers to be just and equitable in all the circumstances having regard to ‘(a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant’s right’; and (ii) 49(3) of the 1996 Act which provides further that the loss referred to in s 49(2)(b) must be taken to include ‘(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and (b) loss of any benefit

		<p>which he might reasonably be expected to have had but for that act or failure to act.’</p> <p>2. Claims of penalisation should be adjudicated on by the WRC in the same manner as discrimination claims.</p>
4	Complainants cannot bring a claim for both penalisation (exclusive of unfair dismissal) and unfair dismissal.	The 2014 Act should be amended to remove this limitation in s 12(2).
5	There is limited training on the 2014 Act for Adjudication Officers of the WRC and none for Labour Court members.	Comprehensive training on the 2014 Act needs to be given to both Adjudication Officers of the WRC and Labour Court members.
6	There is no public interest test in the 2014 Act.	Section 5 of the 2014 Act should be amended to include a public interest test.
7	Section 21 of the 2014 Act requires public bodies to establish and maintain protected disclosures Procedures for workers employed by it. There is no sanction for failing to do so.	Section 21 of the 2014 Act should be amended to: (i) impose a sanction on public bodies who fail to establish and maintain protected disclosures Procedures for workers employed by it; and (ii) provide that a failure by a public body to establish and maintain protected disclosures Procedures for workers employed by it will be taken into consideration in any proceedings under the 2014 Act.
8	There is no obligation on the private sector to establish and maintain protected disclosures Procedures.	The 2014 Act should be amended in line with art 4 of the draft EU Commission Directive on whistleblowing and require certain private sector organisations to establish and maintain protected disclosures Procedures.
9	Ten prescribed persons have either been dissolved, had a change of	1. The prescribed persons’ SIs need to be kept up-to-date.

	name, had a transfer of functions, or merged with another organisation.	2. The maintenance of an online list of prescribed persons in the UK by the UK BEIS needs to be replicated in Ireland.
10	A number of appropriate organisations have not been prescribed.	The prescribed persons' SIs need to be amended to include a number of appropriate organisations.
11	The remit of some prescribed persons is not appropriate.	The remit of all prescribed persons needs to be reviewed and amended where appropriate.
12	Section 22 of the 2014 Act requires public bodies to report by 30 June each year the number of protected disclosures it received in the preceding year. There is no sanction for failing to do so.	<p>1. Section 22 of the 2014 Act needs to be amended to reflect: (i) reg 5(a) of the UK The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507 which provides that the prescribed persons' annual reports must contain 'the number of workers' disclosures received during the reporting period that the relevant prescribed person reasonably believes are- (i) qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996; and (ii) which fall within the matters in respect of which that person is so prescribed'; and (ii) reg 3(3) which provides that the prescribed person is 'not required to report on disclosures that it reasonably believes do not fall within the description of matters in respect of which that person is so prescribed.'</p> <p>2. Prescribed persons require guidance as to the scope and nature of their reporting requirements, including advice in relation to</p>

		<p>reporting on disclosures in their capacity as an employer, a prescribed person, and s 10 disclosures.</p> <p>3. Section 22 of the 2014 Act needs to be amended to include a sanction for public bodies for a failure to comply with their reporting obligations.</p>
13	Section 21 of the 2014 Act does not require prescribed persons to establish and maintain Procedures for persons who wish to make a disclosure under s 7 of the 2014 Act.	<p>1. Section 21 of the 2014 Act needs to be amended to: <i>(i)</i> require prescribed persons to establish and maintain Procedures for persons who wish to make a disclosure under s 7 of the 2014 Act; and <i>(ii)</i> to amend the 2014 Act in line with art 10 of the draft EU Commission Directive on whistleblowing and require prescribed persons to publish information regarding the receipt of reports and their follow-up in their capacity as a prescribed person in a separate, easily identifiable, and accessible section on their website.</p>
14	Prescribed persons' Procedures only contained 17% of the issues included in the DPER Guidance.	<p>1. Prescribed persons require specific guidance for what should be contained in their Procedures for dealing with disclosures in their capacity as a prescribed person.</p>
15	Fifty-three per cent (ten) prescribed persons indicated in their response to the survey undertaken for this thesis that they had received protected disclosures' training.	<p>All prescribed persons should be provided with tailored protected disclosures' training.</p>
16	Volunteers do not fall within the scope of the 2014 Act.	<p>The 2014 Act should be amended in line with art 2 of the draft EU Commission Directive</p>

		on whistleblowing and afford the protection under the 2014 Act to volunteers.
17	Employment specific/ profession specific obligations do not fall within the definition of a ‘relevant wrongdoing’ under s 5(3) of the 2014 Act.	Section 5(3) of the 2014 Act should be amended to include employment specific/ profession specific obligations in the definition of a ‘relevant wrongdoing’.
18	The 2014 Act does not provide for a referral system whereby the WRC can refer a protected disclosure to a prescribed person.	The 2014 Act should be amended to reflect the UK Employment Tribunal (‘ET’) referral system under reg 14 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237 which gives the ET the power to send copies of protected disclosures claims to regulators with the consent of the claimant.
19	There is no oversight authority for prescribed persons.	An oversight authority for prescribed persons should be established in Ireland and provided with the sixteen functions as outlined in this thesis.
20	The current DPER Guidance, the WRC Code of Practice, and the Code of Practice on Grievance and Disciplinary Procedures are inadequate to address an organisation’s obligations regarding the rights of the discloser and the alleged wrongdoer in the context of protected disclosures.	A code of practice that deals specifically with investigation and disciplinary procedures, as well as the issues of data protection, protection of identity, and anonymous disclosures, in the context of a protected disclosure, should be developed.
21	The 2014 Act is silent on the rights of the alleged wrongdoer.	The 2014 Act should be amended to reflect art 16 of the draft EU Commission Directive on whistleblowing and provide for measures for the protection of the alleged wrongdoer.

22	The 2014 Act is silent on the issue of data protection.	<p>1. The 2014 Act should be amended in line with art 18 of the draft EU Commission Directive on whistleblowing in relation to the processing of personal data.</p> <p>2. The 2014 Act should be amended to provide that the Data Protection Commissioner is not precluded from investigating an alleged contravention of the Data Protection Acts 1988, 2003, and 2018 simply because the alleged contravention occurred in the context of, or in connection with, the making of a protected disclosure.</p>
23	The 2014 Act is silent on the issue of the provision of a specific data protection statement to all individuals affected by an organisation's whistleblowing scheme.	Section 21(2) of the 2014 Act should be amended to requiring all organisations to directly provide a specific data protection statement to all individuals affected by an organisation's whistleblowing scheme.

6.3 Limitations

The research undertaken for this thesis had some limitations. A limitation arose with regard to the case law analysis as the number of cases under the 2014 Act is low and therefore can only provide a snapshot of how the 2014 Act is being interpreted and applied. Further, due to the infancy of the legislation, the low number of cases means that not all issues associated with the application and interpretation of the 2014 Act have come to light at this stage. Further, it is unclear what the rate of claims under the 2014 Act actually is as there is no information available as to the number of cases that were initiated under the 2014 Act that ultimately settled. In addition, it is unclear how the protections under the 2014 Act apply to workers other than employees, as there were no decisions in relation to workers under s 13 of the 2014 Act.

Another limitation to the research was that the Trade Secrets Directive was only transposed into Irish law in June 2018 and as the cutoff point for the research was 16 July 2018, there was not enough time to assess the impact of the Trade Secrets Directive on the purpose of the 2014 Act. Also, the introduction of the GDPR on 25 May 2018 also meant that there was a limited timeframe within which the impact of the provisions under GDPR could be assessed in the context of protected disclosures.

Further, the responses by prescribed persons to the survey were lower than anticipated. This means that the findings from the survey are merely illustrative and do not present an overall picture of the prescribed persons' system. However, the responses analysed in conjunction with the analysis of the prescribed persons' websites, annual reports, and Procedures, mean that the impact of the responses is greater than if the research had relied solely on the survey responses to provide an insight into the prescribed persons' system. For future research, a longer period will be provided for response to the survey.

6.4 Future research

There is scope for future research to be undertaken in this area. As the case law under the 2014 Act increases, further patterns and themes will emerge. Going forward the case law of the 2014 Act should be monitored under the same ten headings as used in the research for this thesis. This future analysis may confirm the patterns emanating from the analysis of the case law undertaken by the researcher in the four-year period since the enactment of the 2014 Act, or it may contradict some of the findings. When the draft EU Commission Directive on whistleblowing is implemented, this may affect the case law analysis findings

going forward. For example, if the obligation to implement Procedures is imposed on certain private sector entities, this could reduce the number of claims arising under the 2014 Act in the private sector as it may mean that organisations create a culture whereby workers who make disclosures of wrongdoing are protected from any retaliation for doing so. Further, the recent introduction of the Trade Secrets Directive may also impact on the number of claims under the 2014 Act as it may exclude a number of workers that would have been entitled to protection under the 2014 Act prior to its transposition into Irish law in June 2018 and therefore its impact will need to be assessed. Most importantly, however, it will be paramount that the decision-making of the Adjudication Officers and Labour Court members is subject to continued scrutiny as if there is a sustained misinterpretation and misapplication of the 2014 Act this will make a strong case for the provision of comprehensive, specialised training on protected disclosures law.

There is also scope for more research on the prescribed persons' system. The administration of further surveys, the analysis of prescribed persons' annual reports, the research of the websites of prescribed persons, and the assessment of their Procedures, will further inform a study of the impact and effectiveness of the prescribed persons' system. It is also hoped that this research will be a starting point for a future collaborative research project with a university in the UK where the prescribed persons' system in Ireland and the UK can be compared and contrasted. Further, in order for the prescribed persons' system under the 2014 Act to be effective, it is essential that the wrongdoing can be addressed by those who have the power to carry out an investigation, to remedy the wrongdoing, and to impose sanctions, if appropriate to do so. Therefore, future research would assess whether prescribed persons have the appropriate statutory powers to carry out their functions in respect of the 2014 Act.

The research undertaken for the prescribed persons' system could also be applied generally to the public sector in order to ascertain if public bodies are publishing annual reports, as well as to ascertain the rate of internal disclosures in the public sector and the steps taken to respond to disclosures. The assessment of the rates of compliance by public bodies with their statutory obligation to establish and maintain Procedures and of the content of those Procedures could also be undertaken to determine the impact of that obligation and the DPER Guidance on the public sector. It will also be valuable to assess the impact of the protected disclosures training that has been made available to public sector bodies.

Finally, with the expected adoption of the draft EU Commission Directive on whistleblowing in July 2019, there is potential for much research to be undertaken in light of the position of the protection of workers under the 2014 Act before and after the Directive is adopted. It will be crucial to study whether the provisions of the draft EU Commission Directive on whistleblowing bolster or undermine the purpose of the 2014 Act.

6.5 Original contribution to knowledge

The conclusion reached in this research is that the 2014 Act is not fulfilling its purpose of protecting workers who make protected disclosures. The research undertaken herein has not been undertaken in Ireland to date. It was designed to identify the deficiencies of the 2014 Act, in light of its purpose, and it was hoped that by doing this at an early stage, and by making recommendations for reform, that this would result in steps being taken to improve the legislative system, and its supporting regime, so that the injustices suffered by disclosers since the enactment of the 2014 Act can be minimised going forward. The research undertaken in this thesis has also developed a framework for whistleblowing research to be used by researchers in other jurisdictions, especially after the transposition of the draft EU Commission Directive on whistleblowing into national law by Member States.

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